Supreme Court, U.S.
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No. 02 12

In The

Supreme Court of the United States

Christopher Langdon, Petitioner,

v.

Lyndo Tippett, Roy Cooper et al.

consolidated with:

Christopher Langdon, Petititoner,

v.

J.J. Swain, Jack Murdock, F.D. Martin et al.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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48 pg

QUESTIONS PRESENTED FOR REVIEW

I filed two complaints in the W.D.N.C. . The defendants in *Langdon v. Swain et al.* are in default and failed to meet any of the requirements to set aside the default. Instead of entering a default and a default judgment, the district court consolidated the cases and dismissed them *sua sponte*, without notice and opportunity to be heard, under 28 U.S.C., Section 1915(e)(2), the informa pauperis statute, despite the fact that neither case was filed under 28 U.S.C. 1915 and no other federal court has ever dismissed a fully paid, non-prisoner, non-in forma pauperis complaint under 28 U.S.C. 1915. The Fourth Circuit of the U.S. Court of Appeals affirmed.

(1) May a fee-paid (in full), non-prisoner, non-informa pauperis complaint be dismissed under the informa pauperis statute, 28 U.S.C., Section 1915(e)(2) ?

(2) May a federal court dismiss state law claims, pendent and/or diversity based, via 28 U.S.C., Section 1915(e)(2) ?

(3) Are the pleadings and papers of a *pro se* party required to be liberally construed ?

(4) Are suits against state employees, sued in their individual capacities, for the deprivation

of property without just compensation, allowed in the federal courts, contrary to the Fourth Circuit's ruling ?

(5) May a U.S. District Court dismiss a case, *sua sponte*, based on an allegation of *res judicata*, without notice and an opportunity to be heard on the issue?

(6) May a U.S. Court of Appeals dismiss a case, *sua sponte*, for failure to state a claim, without notice and opportunity to be heard ?

(7) When a plaintiff makes a valid request for the entry of default under Rule 55(a), F. R. Civ. Proc., is the entry of default mandatory, or, discretionary ?

(8) May a default be set aside without any showing of a meritorious defense, good faith, lack of prejudice to the plaintiff and without any affidavits ?

(9) Is a plea of *res judicata* waived if not raised at the district court level and, if properly raised, what requirements must be met to prove it ?

(10) Did the district court have jurisdiction to dismiss my claim for the deprivation of my

property ?

(11) Did the district court judge erroneously deny my motion to transfer my cases and my motions to recuse ?

LIST OF PARTIES

I filed two cases that were consolidated: The first case, *Langdon v. Tippett,Cooper et al.* erroneously included the N.C. Dept. of Justice, the N.C. Att. Gen.'s Office and the N.C. Dept of Transportation as defendants.

The second case, *Langdon v. Swain, Martin, Murdock and Henderson,* erroneously included Mr. Henderson because of a clerical error. I had decided that time constraints prevented the inclusion of claims against him in the complaint. He was not served, and claims against him were not included in the complaint.

There are no corporate entities involved in either of these cases.

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Mendez v. Elliot, 45 F. 3d 75 (4th Cir.1995)
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PETITION FOR WRIT OF CERTIORARI

Petitioner Christopher Langdon respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in these consolidated cases.

OPINIONS BELOW

The opinions of the District Court are unpublished and appear in the Appendix. The opinion of the Fourth Circuit is unpublished, however, it is reported at 29 Federal Appendix 171 and it is included in the Appendix to this petition.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Fourth Circuit was decided on February 20th, 2002 and amended on March 12th, 2002. The "Petition for Rehearing and Rehearing En Banc" was denied on April 11th, 2002. The jurisdiction of the U.S. Supreme Court is invoked under 28 U.S.C., Section 1254(1).

STATUTORY PROVISIONS INVOLVED

U.S. Constitution Amendments I, V & XIV. N.C. Constitution, Article I, Sections 1, 18 & 19; 28 U.S.C., Sections 1738 & 1915; 42 U.S.C. Sections 1983, 1985, 1986; N.C.G.S.136, Sections 103-112, 40A-51, 1-35,1-51, & 1-53; N.C.G.S.132-1; the Magna Carta.

STATEMENT OF THE CASES

I filed two complaints in the U.S. District Court, W.D.N.C. at Ashevillle, N.C. The first complaint was designated case no: 1:01-cv-107, W.D.N.C., hereafter *Langdon v. Tippett* It challenges the constitutionality of several state statutes that inadequately provide a method for obtaining just compensation for the taking of property. The defendants are Lyndo Tipett, the N.C. Secretary of Transp., Roy Cooper, the N.C. Att. Gen. and, erroneously, the N.C. Dept. of Transp. (N.C.D.O.T.) and the N.C. Dept. of Justice. Only Mr. Tippett and Mr. Cooper are proper defendants in this case under the doctrine of *Ex parte Young.* They were sued for injunctive and declaratory relief only, under 42 U.S.C., Section 1983. Jurisdiction is available under 28 U.S.C., Sections 1331 & 1343.

The second case is *Langdon v. Swain, Martin and Murdock* (case no: 1:01-cv-139). It seeks monetary damages for: denial of meaningful access to the courts and the right to petition the government for a redress of grievances (U.S. Const. Amends. I & V); the taking of property without just compensation (U.S. Const. Amend. V, the Magna Carta, the common law and N.C. Const. Article I, Sections 1,18 & 19), conspiracy (42 U.S.C., Sects.1983,1985, 1986), and fraud.

The defendants in *Langdon v. Tippett and Cooper* filed a timely answer, but no motion to dismiss, nor any other dispositive motion.

The defendants in *Langdon v. Swain , Martin and Murdock*, are in default. The clerk of court and the district court refused to enter a default

and a default judgment, despite these facts: the defendants have never filed an answer, have never filed any affidavits and have never presented a meritorious defense. Instead, the district court consolidated the cases and dismissed them under the in forma pauperis statute, 28 USC, Section 1915(e)(2), despite these facts: neither case was filed under 28 U.S.C. Section 1915; I am not now, nor have I ever been, a prisoner; and no federal court has ever dismissed a non-prisoner, non-in forma pauperis case under 28 U.S.C., Section 1915(e)(2), until now.

Prior to the dismissal, I had asked that the cases be transferred to Charlotte, N.C., that the presiding judge, Judge Thornburgh recuse himself and that the noteholders and trustees holding a lien on my property be enjoined, as required by N.C. law as a pre-requisite to jurisdiction. Although no objections to the motions were filed, they were denied. I was never given notice and opportunity to be heard before my complaints were dismissed.

The 4th Cir. named my appeals 01-1975 and 01-2019 and refused to find the defendants Swain, Martin and Murdock in default, ignored my four unanswered motions for sanctions, and upheld the lower court decisions. The defendants in *Langdon v. Swain, Martin and Murdock* filed no affidavits ever, nor did they present a meritorious defense.

I. ERRONEOUS DISMISSAL UNDER 28 U.S.C., SECTION 1915(e)(2), THE IN-FORMA PAUPERIS STATUTE

Prior to my two cases, no federal court has ever dismissed a fully paid, non- informa pauperis, non-prisoner complaint via the in forma pauperis statute, 28 U.S.C. 1915(e)(2). The full fee was paid for both of my complaints, upon filing. I have never been a prisoner, and I did not file either complaint under 28 U.S.C., Section 1915. I have never asked to file any suit under 28 U.S.C., Section 1915.

The U.S. Supreme Court in *Denton v. Hernandez,* 504 U.S. 25, 118 L. Ed 2d 340, 112 S.Ct. 1728, 1729, 1734 (1992) held that the informa pauperis statute does not apply to a fee paid complaint, including those filed by prisoners. After the passage of the *Prison Litigation Reform Act of 1995* Public Law No: 104-134, Sections 801-810, 110 Stat. 1321 (1996), there has been a dispute among the circuits as to whether or not 28 USC 1915(e)(2) applies to all complaints filed by *prisoners*, if filed in forma pauperis, or not. During the proceedings, not a single case was cited in which a non-prisoner, non-informa pauperis complaint was dismissed under 28 U.S.C. Section 1915(e)(2).

Some circuits have ruled that 28 U.S.C. 1915-(e)(2) applies to non-in forma pauperis complaints filed by prisoners. See: *Plunk v. Givens,* 234 F. 3d 112 (10th Circ. 2000); *Carr v. Dvorin,* 171 F. 3d 115 (2nd Circ. 1999); *Martin v. Scott,* 156 F. 3d 578 (5th Cir. 1998). Other circuits disagree. See :*Porter v. Fox,* 99 F. 3d 271 (8th Cir. 1996); *Benson v. O' Brian,* 179 F. 3d 1014 (6th Cir. 1999).

I repeat, neither of my complaints was filed under 28 U.S.C. 1915 and I am not a prisoner.

Furthermore, *Langdon v. Swain, et al* is against three NCDOT engineers in their individual capacities and includes claims for damages for fraud and deceit that can only be heard under state law. I asked that my claim for the deprivation of my property be heard under state law, and alternatively, federal law. No case law was cited indicating that state law claims may be dismissed under 28 U.S.C. 1915(e)(2).

Furthermore, dismissals under 28 U.S.C., Section 1915(e)(2) are reserved for claims that are frivolous. The defendants in *Langdon v. Tippett* (the constitutional challenge case) never asked that my complaint be dismissed because they believed that it was frivolous, nor did they allege that it was frivolous. The defendants in *Langdon v.Swain* never filed an answer. Frivolous claims have been described as those that are fanciful or delusional. Even if my complaints had been filed *in forma pauperis*, they are not frivolous.

" In forma pauperis complaint is properly dismissed as factually frivolous only if its factual allegations are 'fantastic,' 'delusional,' ..and may be dismissed as legally frivolous only if its claims are based on an 'indisputably meritless legal theory." *Nasim v. Warden, Md. House of Correction*, 42 F. 3d 1472, 1473[2] (Fourth Cir. 1995).

The allegation of frivolousness was based on an alleged defense of *res judicata*, discussed in another section herein in detail. The only authority cited by the courts and the defendants for dismissing my cases was 28 U.S.C. 1915.

II. COMPLAINTS AGAINST STATE OFFICIALS FOR THE DEPRIVATION OF PROPERTY ARE ALLOWED IN FEDERAL COURTS.

Langdon v. Swain, Martin and Murdock, includes claims for the deprivation of my property without compensation that may be heard on a diversity basis and/or a federal basis. Those defendants are being sued in their individual capacities only. They were acting under the color of state law.

The U. S Court of Appeals for the Fourth Circuit *sua sponte* dismissed my claims for the deprivation of my property without compensation, ruling that such complaints are not allowed in federal court against state officials, contrary to decisions by the U.S. Supreme Court and every U.S. Court of Appeals.

The U.S. Supreme Court ruled in *Lynch v. Household Finance,* 405 U.S. 1036, 92 S.Ct. 1113, 31 L. Ed 2d 424 (1972) that property rights are among the civil rights that were intended to be protected by the *Civil Rights Act of 1871,* now 42 U.S.C., Section 1983. In *Weddle v. Director, Patuxent Institution,* 405 U.S. 1036, 92 S.Ct. 1318, 31 L. Ed 2d 577 (1972), the U.S. Supreme Court vacated the Fourth Circuit's ruling at 436 F. 2d 342 (4th Cir. 1970) because Section 1983 suits against state officials for the deprivation of property are allowed. See also: *Siu v. Johnson,* 748 F. 2d 238 (4th Cir. 1984); *Clayton v. Shaw,* 548 F. 2d 155 at 1156 (5th Cir. 1977); *Bayron v. Trudeau,* 702 F. 2d 43 (2nd Cir.1983).

Additionally, the claims for deprivation of my property could have been heard under state law because of diversity of citizenship and/or as pendent state claims.

My claims for the deprivation of my property were dismissed because, allegedly, they failed to state a claim upon which relief could be granted. The claims were dismissed under 28 U.S.C., Section 1915(e)(2). Even *if* my complaint had been filed under 28 U.S.C.1915, dismissal for failure to state a claim would still have been erroneous. The U.S. Supreme Court has ruled that dismissals for failure to state a claim are not allowed under the in forma pauperis statute. *See: Neitzke v. Williams,* 490 U.S.319, 104 L. Ed 2d 338, 109 S.Ct. 1827,1828, 1833 (1989).

I was not given notice and opportunity to be heard on the issue of an alleged failure to state a claim, before, or after, the ruling. My petition for rehearing and rehearing en banc was denied, thereby denying me the opportunity to be heard on the alleged issue. The issue was never raised by the defendants, nor by the district court. Notice and opportunity to be heard are the essentials of due process of law and equal protection under the law. The notice and hearing must be meaningful and at a meaningful time. *See: Armstrong v. Manzo,* 380 U.S. 545, 85 S.Ct. 1187, 14 L. Ed 2d 62 (1965). Most, if not all, circuits, except the Fourth Circuit, require a hearing before a dismissal for failure to state a claim. *See: Local 267 v. Ohio Carpenters Health & Welfare Fund,* 926 F. 2d 550 (6th Cir. -1991); *Morrison v. Tomano,* 755 F. 2d 515 (6th Cir.-1985); *Doe v. St. Joseph's*

Hospital, 788 F. 2d 411 (7th Cir. 1986); *Oatess v. Sobolevitch,* 914 F. 2d 428 (3rd Cir. 1990). Notice and hearing are particularly important with respect to pro se claims.
See: Bayron v. Trudeau, supra.

III. THE PLEADINGS AND OTHER PAPERS OF PRO SE PARTIES ARE TO BE LIBERALLY CONSTRUED.

The Supreme Court has repeatedly ruled that the pleadings and papers of a pro se party, particularly in a civil rights case, must be liberally construed and the pro se party is to be given every opportunity to make their case. If a court fails to do so, it is my understanding that its judgment is subject to reversal. *See: Haines v. Kerner,* 404 US 519 (1971); *Estelle v. Gamble,* 429 U.S. 97 (1976); *Roseboro v. Garrison,* 528 F. 2d 309 (Fourth Cir. 1975). The rule applies in cases where the pro se party is not a prisoner: *Sellers v. M.C. Floor Crafters, Inc.,* 842 F. 2d 639 (2nd Cir. 1988).

It is my understanding that Mr. Justice Breyer, appearing on C-Span on 8-04-2001, stated that most of the people that wanted to file a case and couldn't afford an attorney, were unable to get *pro bono* assistance. Nearly all people that proceed pro se do so because they can't afford an attorney. Bias against pro se parties is a form of economic bias and economic bias is forbidden by the equal protection clause. *See : Harper v. Virginia Board of Elections,* 383 U.S. 663 (1965).

The district court and the U.S. Court of

Appeals never stated that my papers had been liberally construed. I wasn't supplied any information as to any attorneys and/or organizations that might assist me *pro bono.* The Court of Appeals informed me that oral arguments by pro se parties are disfavored. Local Rule 46(g) states: *" Cases involving pro se litigants are ordinarily not scheduled for oral argument,"* a de facto ban on oral arguments by pro se parties.

Because I was not given any hearing before my cases were dismissed by the district court, I sought oral arguments before the Fourth Circuit to make sure that my legal arguments were addressed and fully considered. My motion for oral argument was denied. I doubt that any pro se party has been given the opportunity to participate in oral argument before the Fourth Circuit.

" Pro se civil rights litigant should be afforded every reasonable opportunity to demonstrate that he has a valid claim." Satchell v. Dillworth, 745 F. 2d 781 at 782[5] (2nd Cir. 1984)

I filed a timely motion for an extension of time to file a petition for rehearing, and rehearing en banc. I asked for an additional11 days to file the petition and was denied. I believe the motion should have been granted because I was proceeding pro se and because the Court of Appeals had raised the alleged issue failure to state a claim *sua sponte,* without notice and an opportunity to be heard.

IV. IS THE ENTRY OF A DEFAULT MANDATORY, OR, DISCRETIONARY AND

HOW MAY A DEFAULT BE REMOVED ?

Rule 55(a) of the Federal Rules of Civil Procedure states: " Entry. When a party against whom a judgment for affirmative relief is sought has failedto plead or otherwise defend and that fact has been made to appear by affidavit or otherwise, the clerk shall enter the party's default."

"Shall" in statutes is mandatory. It is my understanding that the proper procedure is for the clerk to enter the default when requested to, if the defendants have not answered. It is then up to the defendants in default to move to have the default set aside.

I made the clerk of court's office aware that the defendants in *Langdon v. Swain* were in default, verbally, and they refused to enter the default. I also mailed a verified motion for default entry to the clerk of court's office via U.S. Express mail, and a verified motion for default judgment. The default was not entered, although the defendants filed no response to the motions and have never filed an answer. However, a party is in default whether or not the default is entered in the docket.

"...the defendants are in a position of having failed to plead or otherwise to defend within twenty days...They are, therefore, in default. There has been no entry of default... But that entry is purely a formal matter." *Orange Theater Corp. v. Rayhertz Amusement Corp., et al.*, 130 F. 2d 185, 187[2] (3rd Cir. 1942).

" However, the entry of default is largely a formal matter..' 6 James W. Moore et al. *Moore's Federal Practice*, Section 55.03[2], at 55-21 (2d

Ed. 1994)." *Pinaud v. County of Suffolk*, 52 F. 3d 1139 at 1152, Footnote # 11 (2nd Cir. 1995).

" ...the entry of default by the clerk is purely a formal matter and the default should be entered by him as of course.." 35 C.J.S., FEDERAL CIVIL PROCEDURE, Section 1123, page 510.

" A party's default is not excused simply because it is not recorded in the docket." *Moore's Federal Practice*, 3d Edition, Section 55.11 [5] (2000).

Some circuits will construe a late filed answer as a motion to set aside a default entry.

" Filing a late answer is analogous to motion to vacate default." *John v. Sotheby's, Inc.*, 141 F.R.D. 29 (S.D.N.Y. 1992)

In *Traguth v. Zuck*, 710 F. 2d 90 at 94 (2nd Cir. 1983), a late filed motion for additional time to answer was construed as a motion in opposition to the entry of default. However, it was filed by a pro se party and contained an allegation of a meritorious defense.

The defendants in the complaint for damages, *Langdon v. Swain, Martin and Murdock* never filed an answer. The defendants did file a motion for an extension of time to answer and two amended motions for an extension of time to answer. The first motion for an extension of time was denied, however, the two amended motions were allowed, although they were signed and mailed beyond the time for filing an answer. In one of the amended motions, a request was made that a default not be entered against defendant Jack Murdock.

Even if the Court were to rule that a late

motion for an extension of time may be construed as a motion to set aside a default, it still must meet all the requirements to set aside a default. Most circuits, if not all, require the following to set aside a default: a reason for not filing a timely answer, supported by an affidavit; a meritorious defense, supported by facts; lack of prejudice to the plaintiff; and a showing of good faith.

" While a default was never entered on the district court docket sheet...Zuck's request should have been considered as a motion to set aside an entry of default...Whether good cause is deemed to have been shown depends upon.. .. 'whether the default was willful, whether setting it aside would prejudice the adversary and whether a meritorious defense is presented." *Traguth v. Zuck*, 710 F. 2d 90 at 94 (2nd Cir. 1983).

" Refusal to set aside default against defendant who did not support his late claim, that favorable evidence could be presented on trial by merits, with affidavits or documents, and who did not specify his potential witnesses, was not abuse of discretion." *Madsen v. Bumb*, 419 F. 2d 4 at 4[4] (9th Cir. 1969).

" The affidavits the defendants filed were no more than conclusory denials and were properly held to be insufficient....the district court did not abuse its discretion in refusing to set aside the default." *Sony Corp. v. Elm State Electronics, Inc.*, 800 F. 2d 317 at 321 (2nd Cir. 1986).

" A court generally may.. extend the time within which the defendant must plead..The

defendant typically must show that he or she has a meritorious defense." 71 C.J.S. PLEADING, Section 169, page 222 (2001).

" In most cases.. the court will require the party in default to demonstrate a meritorious defense to the action..A majority of the courts .. have refused to accept general denials or con clusory statements that a defense exists ." *Federal Practice & Procedure*, Wright, Miller & Kane, Chapter 8, Section 2697, pages 155-56, 160 (1998)

In one of the amended motions for an extension of time to answer, it was alleged that there was some confusion as to when the defendants were required to file an answer. No details were provided and no affidavit was submitted to support the assertion.

Defendants Swain, Martin and Murdock never filed a single affidavit with the district court, nor with the Court of Appeals. They never asserted in any of their motions for an extension of time (Exhibits 3 & 4) that they had a meritorious defense, nor did they cite any facts to support a meritorious defense. They did not assert in the motions that I, the plaintiff, would not be prejudiced by an extension of time.

Mr. Murdock's "excuse" for failing to timely answer was an assertion that he failed to answer because he threw the complaint and summons away because he believed that they were related to a state case against him. That is contumacious behavior, exhibiting bad faith.

The late filed amended motions for an extension of time to answer were allowed and my verified motions for default entry and default

judgment were denied by Magistrate Judge Cogburn, stating that the failure to file a timely answer *appeared* to be due to "excusable neglect," indicating his uncertainty.

The failure of Swain, Martin and Murdock to answer is inexcusable because, more than two weeks before an answer was due, I mailed a letter to them, urging them to timely respond. It was also faxed to Swain and Martin, and was mailed to Mr. Crawford, their attorney. On July 9th, 2001, I called Mr. Crawford to discuss a motion in *Langdon v. Tippett.* Mr. Crawford mentioned that his office had received a copy of *Langdon v. Swain, Martin and Murdock.* I asked him if he wished to discuss the case and he said no.

Mr. Crawford never attempted to discuss any of the motions for an extension of time to answer before filing them, and there is no statement in any of the motions for an extension of time to answer that indicates that the counsel for the defendants attempted to discuss them with me, contrary to local rule 7.1(A), of the W.D.N.C. The 4th Cir. was aware of these facts through verified documents and a copy of the letter. No denials of these facts were offered by the defendants, or, their attorneys.

" An attorney opposed only by a *pro se* litigant is not permitted to sit back blithely and not discharge the responsibility to confer simply because there is not an attorney on the other side." *Harrell v. U.S.*, 117 F.R.D. 86, 91 (E.D.N.C.).

At the appeals court level, defendants Swain, Martin and Murdock gave no additional "excuses" for failing to file a timely answer, or,

a timely motion for extension of time to answer, and no affidavits. I filed over 15 verified documents with the lower courts.

The defendants, in their "Appellee's Brief," argued that excusable neglect was the reason for their failure to answer, however, they did not mention it in any of their motions for an extension of time. The 4th Circuit agreed, erroneously relying on *Pioneer Investment Services v. Brunswick Associates,* 507 U.S. 380,123 L. Ed 2d 74, 113 S.Ct. 1489 (1993). In that case the Court ruled that the failure to timely file proofs of claim was the result of excusable neglect because the notice of the filing date was placed obscurely in the court papers (113 S. Ct. at 1491). It is my understanding that the attorney who missed the deadline filed an affidavit explaining why he missed the deadline. Affidavits are essential. *See: Robinson v. Bantam Books,* 49 F.R.D. 139 at 141 (S.D.N.Y. 1970), citing *Standard* Newspapers *v. King,* 375 F. 2d 115 (2d Cir. 1967); *Thompson v. Wooster,* 114 U.S. 104, 5 S.Ct. 788 (1885);

Furthermore, the decision in *Pioneer* does not apply to failures to timely file where there is an unambiguous rule and the failure to file is within the party's own control. See: *Kyle v. Campbell Soup Co.,* 28 F. 3d 928, 931-932 (9th Cir. 1994); *Thompson v. E.I. Du Pont de Ne-mours & Co., Inc.,* 76 F. 3d 530 (4th Cir. 1996).

The decision in *Pioneer* indicates that if there is any sign of bad faith, excusable neglect should not be found(113 S. Ct. at 1500). I gave numerous, verified examples of the bad faith conduct of defendants Swain, Martin and

Murdock in my verified complaint, verified brief, verified reply brief and four verified motions for sanctions. The defendants only response was their brief at the appeals level, unverified and without affidavits. They filed no responses to my four, detailed, documented, verified, motions for sanctions. All of the verified, documented allegations of the bad faith conduct of defendants Swain, Martin and Murdock should have been deemed admitted.

" ...we must accept as true the movant's undenied allegations. *Lonsdorf v. Seefeldt,* 47 F. 3d 893, 897 (7th Cir. 1995)," *Tobel v. City of Hammond,* 94 F. 3d 360 at 362 [4] (7th Cir. 1996).

One egregious example of bad faith is the assertion that Murdock failed to answer, or, timely file an extension of time, because he threw away the complaint and summons, believing that they were related to a state case (Exhibit # 3). That shows bad faith and it is not entirely credible. I agree that Mr. Murdock intentionally threw away the complaint and summons, however, that doesn't explain why he failed to file an answer, or, a timely motion for an extension of time. He knew they were court documents.

I supplied the Court of Appeals with a verified statement, un-denied by the defendants, that I had spoken with Mr. Murdock's attorney, Mr. Crawford, on 7-09-01, *nine days* before an answer was due by Mr. Murdock. On that day, Mr. Crawford told me that his office had received a copy of *Langdon v. Swain, Martin and Murdock.* The fact that Mr. Murdock had thrown away the complaint and summons is no excuse for his failing to answer.

Also, Mr. Murdock is an engineer, not an illiterate person. It is unimaginable that he mistook a federal complaint and summons for state court papers.

Please note that: " Bad faith may be found not only in the actions that led to the lawsuit, but also in the conduct of the litigation." *Roadway Express v. Piper*, 447 U.S. 752, 100 S.Ct. 2455 at 2464 [16] (1980).

To better understand the defendants' bad faith, it is best to relate the events that led to the destruction of the value of my property in Polk County, N.C., by the defendants, Swain, Martin and Murdock, and how they prevented me from obtaining access to the courts, perpetrated fraud and destroyed my business.

After a micro-slide (15 sq. ft.) occurred within the NCDOT's right of way, I contacted a former NCDOT employee who informed me that the steepness of the NCDOT's bank, within their right of way (r.o.w.), and their drainpipe were the causes of the problem. I then contacted Mr. Swain, who refused to undertake preventative measures within the NCDOT's r.o.w. I was told by other parties that if such measures weren't taken, the slides would eventually progress beyond the r.o.w. and damage my property (Exhibits 5 & 6).

Instead, Swain recommended that I take preventative measures within the NCDOT's r.o.w., including regrading the NCDOT' s bank within their r.o.w., building a retaining wall within the NCDOT's r.o.w. and moving the outlet of the NCDOT's drainpipe that is within their r.o.w. (No denials of these facts

were offered by the defendants).

I later contacted private engineers who concluded that the NCDOT was responsible for the slides, because of the steepness of their bank and their drainpipe. I also contacted Mr. Beck of the N.C. Dept. of Environment, Health and Natural Resources who stated that he believed that the NCDOT's drainpipe was the cause of the problem. His affidavit was attached to the complaint against Swain et al. If the NCDOT engineers, Swain, Martin and Murdock had admitted early on that the NCDOT's bank was too steep, and taken preventative measures within their r.o.w., the deprivation of my property rights could have been avoided.

My verified complaint (Exhibit # 2) states: " The other cause of the slides [in addition to the NCDOT's drainpipe] was the improper sloping ofthe NCDOT's bank..I later learned.. that there is a *Design Manual* published by the NCDOT. I was told by one of the authors of the manual, Mr. Shearin [an NCDOT engineer], that the NCDOT's bank... was not sloped according to the NCDOT's standards contained in the *Design Manual.* Swain, Martin and Murdock concealed from me the fact that the NCDOT's bank was not properly sloped according to the NCDOT's own standards."

The defendants never denied that the NCDOT's bank was improperly sloped, nor did they deny that the improper sloping of the NCDOT's bank was a factor in the deprivation of my property rights.

The defendants in *Langdon v. Swain, Martin, and Murdock* never denied my verified, detailed

accusations that they conspired together to conceal their, and the NCDOT's, responsibility for the deprivation of my property rights and their denial of my rights of access to the courts. *See: Ryland v. Shapiro,* 708 F. 2d 967 5th Cir. 1983).

The only denials they made were general, conclusory denials, in the "Appellee's Brief," unverified, denying that the defendants had deprived me of my property and denying that the defendants had harmed me in any way. Those conclusory denials are insufficient to establish good faith to defeat a default entry, or, a default judgment.

Instead of taking responsibility, Swain, and Murdock began blaming me for the problem, including false statements to the media. My lawsuit and motions for sanctions contain specific, detailed assertions, verified, that defendants Swain, Martin and Murdock intentionally gave false, conflicting reasons for the slides and for the destruction of the value of my property.

In my verified complaint (Exhibit 2) I also specifically stated that NCDOT attorney Michael Warren, had admitted that Swain, Martin and Murdock had intentionally made statements that they knew were false, that blamed me for the numerous slides that destroyed the value of my property. Other than the conclusory assertion of the defendants in their "Appellee's Brief" that they had not harmed me, the defendants have made no denial of these facts and submitted no contradictory affidavit by Mr. Warren, Swain,Murdock, Martin, or anyone.

Swain, Martin and Murdock never addressed my claims for the denial of my right to access to the courts, to petition for a redress of grievances, fraud, the destruction of my business, contractual interference, thus, admitting liability as to those claims, and bad faith. The lower courts never addressed any of those claims either.

I filed four motions for sanctions against Swain, Martin and Murdock, seeking costs and a default. The defendants never responded to those motions. The first motion for sanctions explained that Swain, Martin and Murdock had admitted responsibility for the deprivation of my property, contrary to their "Appellees' Brief."

The other verified motions for sanctions, unanswered, included detailed examples of the bad faith conduct of Swain, Martin and Murdock, including their numerous, false and contradictory statements regarding the causes of the slides and the concealing of evidence.

I had asked for copies of the construction records from Swain, when he was the District Engineer, and he refused to allow me to see them, contrary to the N.C. Public Records Law. (N.C.G.S. 132-1 et seq.).

I also related how defendants Swain, Martin and Murdock had agreed to be deposed in a state court proceeding and then reneged on the agreement in order to prevent me from getting meaningful access to the courts and a full and fair hearing of my claims. No answer was given by the defendants to these facts, and others, in my four verified motions for sanctions. Therefore, the motions should have been

granted and the assertions contained therein should have ben deemed admitted.

" When a party files a motion and the opposing party fails to respond, the court may construe such failure to respond as non-opposition to the motion or an admission that the motion was meritorious, may take the facts alleged in the motion as true.." 56 AM JUR 2D, "MOTIONS," SECTION 29, PAGE 24 (2000).

I also gave detailed, verified evidence in several of my papers of how the defendants' extension of time to answer has prejudiced me greatly.

Additionally, those defendants did not quickly move to correct the default. By 7-20-01 they knew they were in default. To try to remove the default they could have responded to my verified motions for: default entry, default judgment, and to strike the defendants' motions for extensions of time to answer. Instead of filing an answer, they sat back and waited approximately nine days, until the magistrate judge granted their amended motions for an extension of time to answer.

V. WAS THE ALLEGED ISSUE OF RES JUDICATA ERRONEOUSLY RAISED AND SHOULD IT HAVE BEEN DECIDED ?

Because the alleged issue of res judicata was not properly raised, and because the defendants in *Langdon v. Swain, Martin and Murdock* are in default, I shouldn't have been required to argue the alleged issue. I informed the Court of Appeals that: I wasn't waiving my objections to the way the issue was raised; the fact that

the defendants in *Langdon v. Swain, Murdock and Martin* are in default; that I didn't have notice and opportunity to respond to the alleged issue; that I wasn't waiving any other objections; and that I wasn't litigating the alleged issue by implied consent, nor am I doing so now.

As a pro se party, the raising of the alleged issue by the court, without a hearing, put me in a difficult position. If I failed to respond to the alleged issue, it might have been misconstrued as an admission that it was genuine. If I argued the alleged issue, it might be misconstrued as a a willingness to argue the issue by implied consent.

It is my understanding that if I responded in the hypothetical, and/or, the alternative, I would not be litigating the alleged issue of res judicata by implied consent. I asked the Court of Appeals to ignore, or strike, anything that might be construed as an intent to litigate the alleged issue by implied consent, and I do so now.

If the defendants hadn't been in default, and *if* the question of res judicata had been properly raised, and *if* I had been given notice and opportunity to be heard on the alleged issue, it still would have failed because:

(a) There was no hearing by the district court.

" Because the trial court did not subject its res judicata decision to the rigors of the adversarial process, we set aside the court's conclusion." *State of Nevada Employees Assoc., Inc. v. Keating*, 903 F. 2d 1223, 1225 (9th Cir.1990)

A hearing is particularly important for a pro se party. A litigant is entitled to a fair hearing

in the first instance. *Armstrong v. Manzo, supra; Ward v. Village of Monroeville,* 409 U.S. 57, 93 S. Ct. 80 (1972).

(b) The district court and the 4th circuit did not liberally construe my pleadings and other papers, contrary to *Haines v. Kerner, supra.*

(c) The dismissal was under 28 U.S.C., Sect. 1915(e)(2), inapplicable to my lawsuits.

" In the absence of.. statutory authority, it is inappropriate for trial court to dispose of the complaint *sua sponte* on an objection to complaint that would be waived if not raised by the defendants in timely manner." Sinwell v. Shapp, 536 F. 2d 15, 19 [5-6] (3rd Cir. 1976).

(d) The district court, by raising the alleged issue *sua sponte,* became an advocate for the defendants. *See: Porter v. Fox, supra,* at 274.

(e) The defendants in *Langdon v. Swain* filed no answer. " A failure to make any answer to a plaintiff's complaint waives the defense of res judicata." 47 Am Jur 2d JUDGMENTS, Section 717, page 186 (1995)

In limited situations, a court may raise the issue ".. where the latter action arises in the same court as an earlier action." 47 Am Jur 2d, supra at Section 708.

See also: U.S. v. Sioux Nation, 448 U.S. 371, dissenting opinion of Mr. Justice Rhenquist at 432. In my case, the lower courts didn't have a copy of the record of any previous case.

(f) The district court judge, Judge Thornburgh, dismissed my cases because of an alleged N.C. judgment, without considering, or citing, the N.C. law of res judicata. In a previous decision

the judge held that:

" ..federal courts are not allowed 'to employ their own rules of res judicata in determining the effect of state court judgments'..*In re Genesys Data Tech, Inc.*, 204 F. 3d 124, 127 (4th Cir. 2000). Hammel v. State Farm Mutual, 114 F. Supp. 2d 478, 481 (W.D.N.C. 2000).

(g) N.C. case law, and federal case law, state that res judicata is claim preclusion and the burden of proof is upon the one asserting it. To establish claim preclusion, N.C. law requires the submission of the entire record of the prior case. *See Reid v. Holden*, 88 S.E. 2d125, 129 [7-8] (N.C. 1955). The defendants did not do so.

" Generally, the plea of res judicata..cannot be determined from the pleadings alone." 47 Am Jur 2d JUDGMENTS, Section 719, citing *Hayes v. Ricard*, 112 S.E. 2d 123, 124 [7] (N.C. 1960).

" General rule is that party who wishes to avail himself of a prior judgment as res judicata must introduce the whole record of the prior proceeding." *Bryson v. Guarantee Reserve Life Insurance Co.*, 520 F. 2d 563 at 563[4] (8th Cir. 1975).

See also: Hart Steel Co. v. Railroad Supply Co., 244 U.S. 294, 37 S.Ct. 506 at 506 (1917).

The alleged documents submitted by the defendants didn't include the pleadings, let alone an entire record, and they weren't certified, as required.

" In addition, we have reviewed the record on appeal and do not find therein an authenticated copy of the judgment of the Colorado Court of Appeals required under 28 U.S.C., Section

1738 in order to have full faith and credit effect." Horwitz v. St. Brd. of Med. Examiners, 822 F. 2d 1508, 1512 [4] (1987).

See also: Williams v. Liberty, 461 F. 2d 325, 327[3] (7th Cir. 1972); *Chung Young Chew v. Boyd*, 309 F. 2d 857, 859[14] (9th Cir. 1962); *Bank of State of Alabama v. Dalton*, 9 Howard (50 U.S.) 522, 528 (1850); *Northwestern Mut. Life Ins. Co., v. Stevens*, 71 F. 258 at 264 (8th Cir. 1895).

The defendants in *Langdon v. Tippett and Cooper* did file an answer and in it they alleged a defense of res judicata, however, they took no further action on the alleged issue. The alleged defense was based on a single alleged judgment. and no copy of any court documents, certified or uncertified, were attached to the answer. The defendants in *Langdon v. Swain, Martin and Murdock* filed no answer.

At the appeals level, the Court allowed the defendants' motion to submit supplemental material, despite my objections, that made reference to other alleged judgments in the state courts. The materials did not contain the pleadings of any case, nor the rest of any record, and no certifications, as required by law.

Furthermore, the Fourth Circuit allowed the defendants in *Langdon v. Tippett* to submit materials not referred to in their answer filed at the district court level. In their joint "Appellees' Brief," the defendants only referred to a single, alleged decision and the brief never referred to any of the other alleged decisions referred to in their supplemental materials. Stated otherwise, they were allowed to argue by implication.

In its opinion, the 4th Cir. did not refer to any specific case as the basis of res judicata.

(h) N.C. law requires privity between the parties to sustain res judicata. *Hayes v. Ricard, supra.*

" Privity,' for purposes of res judicata..denotes mutual or successive relationship to the same rights of property." State Ex Rel. Tucker v. Frinzi, 474 S.E. 2d 127 at 127[6] (N.C. 1996).

N.C. does not suscribe to the theory of "virtual representation." The lower courts held that the defendants in *Langdon v. Swain*, sued in their individual capacities, are in privity with the State of N.C., citing no case law.

" A government official sued in [their] personal capacity is not considered in privity with the government." Moore's Fed. Practice, 3d, Sect. 131.40[3][e], pages 131-148 (2001);

See also: Andrews v. Daws, 201 F. 3d 521, 525-26 (4th Cir. 2000); *Conner v. Reinhardt* 847 F. 2d 384, 385 (7th Cir. 1988). The fact that Swain, Martin and Murdock might be indemnified by the state does not alter the situation.

" If we were to hold otherwise, by passing comprehensive indemnification statutes, states could set up sovereign immunity as a defense for almost all individuals sued for damages in their individual capacities under Section 1983." Downing v. Williams, 624 F. 2d 612, 626[18-19] (5th Cir. 1980).

" In North Carolina, in order that a judgment in a former case may be held res judicata, there *must* be identity of parties.." Phipps v. Robinson, 858 F. 2d at 967[1] (4th Cir.1988). (emphasis added).

The lower courts' findings of res judicata were hinged on their erroneous finding that there was privity between the N.C.D.O.T engineers, in their individual capacities, and the State of N.C., without citing any supporting case law.

(i) The defendants referred to no valid court judgment in their "Appellee's Brief." Only a valid judgment may support res judicata and a void judgement is subject to collateral attack. *Collins v. Foreman,* 729 F. 2d 108,1_11[2] (2nd Cir. 1984). In their brief, un-verified, they mentioned only one prior alleged judgment. It was, and is, my contention that *if* the defendants had properly raised the question of res judicata, and if the defendants in *Langdon v. Swain* weren't in default, and if the defendants had supplied a certified copy of the record, the case would not support res judicata because the court that allegedly rendered the judgment lacked jurisdiction. I cited specific case law and facts in support of my contention. The defendants never even made a conclusory statement that the rendering court had jurisdiction and that the judgment was valid, not void.

(j)I also provided detailed, verified, assertions that I had no full and fair opportunity to litigate any of the present claims in any previous state court proceedings.

" As *Kremer* indicates, 456 U.S. at 482, 102 S.Ct. at 1898, neither state nor federal courts may give preclusive effect to a prior judgment rendered in a hearing conducted without constitutionality mandated due process protections.." Lee v. Winston, 717 F. 2d 888 at 899 [9] (4th Cir. 1983."

The defendants never denied these assertions, nor did they assert, even in conclusory terms, that I had a full and fair opportunity to litigate any of the present claims in any previous court.

(k) I also stated in my verified papers that; the N.C. state court remedies are inadequate, in theory and in practice, particularly as applied to me. The state remedies are also inadequate for pro se parties. I also stated that I had reserved my federal claims for the federal courts. The defendants never denied these assertions.

VI. SHOULD THE DISTRICT COURT JUDGE HAVE RECUSED HIMSELF, AND TRANSFERRED THE CASES AND DID THE COURT HAVE JURISDICTION ?

I asked that my cases be transferred to the Charlotte Division, W.D.N.C. because it is much closer to my residence in Florida. The actions of defendants Swain, Martin and Murdock have caused me great financial hardship. Having the cases heard in Asheville, not Charlotte, would cause me a great deal more time and expense.

I also asked that Judge Thornburgh recuse himself because of an appearance of partiality. *Langdon v. Tippett and Cooper* challenges the constitutionality of several N.C. statutes. Mr. Cooper is the N.C. Att. Gen., an elected office formerly held by Judge Thornburgh. While serving as attorney general, Judge Thornburgh was required to defend the statutes of N.C. against constitutional challenges. It is natural for Judge Thornburgh to identify with the interests of the State of N.C. and with Mr. Cooper. Additionally,

it is my understanding that Mr. Cooper was the head of the house and/or senate judiciary committees in N.C., while Judge Thornburgh was attorney general, and that they had a close working relationship. It is also my understanding that they are members of the same political party and that they may have contributed, financially and/or otherwise, to each others' campaigns.

" Any tribunal...not only must be unbiased but also must avoid the appearance of bias." *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 59 S.Ct. 337 at 337[5] (1969).

An article in the *Raleigh News & Observer* stated that Secretary Tippett contributed $29, 500 to former Gov. Hunt's election fund. Judge Thornburgh served under Gov. Hunt and is considered a close political ally and associate of his. It is possible that Mr. Tippett also contributed heavily to Judge Thornburgh' s election campaign for attorney general. I never stated, nor implied, that there was anything improper or illegal in these relationships, only that they gave the appearance of partiality.

With regards to *Langdon v. Swain et al.*, it is possible that Judge Thornburgh may have defended those defendants and/or their actions, as attorney general. I also supplied detailed, verified, un-denied allegations of related misconduct by T.L. Malonee, an attorney who, I believe, served under Judge Thornburgh when he was the N.C. Att. Gen. I showed that Mr. Malonee illegally removed relevant evidence from the NCDOT's district office to his office in

Asheville, contrary to N.C.G.S. 132-1, the Public Records Law. Additionally, the decision of Judge Thornburgh contains numerous, important factual errors. There are factual errors in the defendants brief and in the Fourth Circuit's decision, only one of which was corrected in the amended opinion. Also, Judge Thornburgh's dismissal of my cases, without notice and an opportunity to be heard, and under an inapplicable statute, indicates bias.

I also presented case law, un-refuted by the defendants, showing that the court did not have jurisdiction to dismiss my claims for a deprivation of my property, under N.C. law, without enjoining the noteholders and trustees, because they are necessary parties.

" When absence of necessary party is disclosed, trial court should refuse to deal with merits until the necessary party is brought in." *White v. Pate*, 304 SE 2d 199 at 199[3] (N.C. 1983).

Therefore, I respectfully ask that this petition for a writ of certiorari be granted.

I solemnly affirm, under oath, that everything contained herein is true and correct, except those matters asserted on information and belief, and those matters I believe to be true and correct. S.M.

Christopher Langdon, _____

Suscribed to and sworn before me, this the 10th, 11th S.M. day of June, 2002.

Notary Public Samuel Martin

Samuel Martin My Commission DD [illegible] Expires May 15, 2005

Samuel Martin/MY EXP. 15:5/15/05

COUNTY OF: ORANGE/STATE OF: FLORIDA

BEST AVAILABLE COPY

Supreme Court, U.S.
FILED

02 12 JUL 12 2002

No.

In The

Supreme Court of the United States

Christopher Langdon, Petitioner,

v.

Lyndo Tippett, Roy Cooper et al.

consolidated with:

Christopher Langdon, Petititoner,

v.

J.J. Swain, Jack Murdock, F.D. Martin et al.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Fourth Circuit

APPENDIX, PART I, FOR PETITION FOR WRIT OF CERTIORARI

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40 pg

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA

FILED : ASHEVILLE, N.C.
2001 JUL 27 PM 4:32
U.S. DISTR. COURT
W. DIST OF N.C.

CHRISTOPHER LANGDON,
Plaintiff,

vs.

J.J. SWAIN; JACK MURDOCK;
F.D. MARTIN; DAVE HENDERSON
(ALL CURRENT OR FORMER
EMPLOYEES OF THE N.C. DEPT.
OF TRANSP.),
Defendants

ORDER

THIS MATTER is before the court upon the Motion for an Extension of Time to Answer filed on behalf of all defendants (#6); the Amended Motion for Extension of Time to Answer filed on behalf of defendants Swain, and Martin (#7); the Amended Motion for an

Extension of Time to Answer on behalf of Defendant Murdock (#8); plaintiff's Motion For Default Entry By the Clerk of Court (#9); and plaintiff's Correction of Motion for Default Entry By Clerk of Court (#10).
It appearing that defendants' error in seeking the proposed extensions was based upon a misunderstanding as to when defendants were served and that defendants took prompt remedial action, the court attributes the error to excusable neglect and will grant the proposed extensions, which moots plaintiff' motions.

ORDER

IT IS THEREFORE ORDERED that
(1) defendants' amended motions for extension
of time to answer (#s 7 & 8) are GRANTED, and
defendants are allowed up to and inclusive of August 17, 2001, to answer or otherwise respond; (2) defendants Motion for Extension of Time to File Answer (#6) is DENIED as moot;
(3) plaintiff's Motion for Default Entry By Clerk of Court (#9) is DENIED as moot;
(5) [sic] plaintiff's Correction for Default Entry By the Clerk of Court (#10) is DENIED as moot.

This the 27th day of July, 2001.

"s/_____."
Max Cogburn, Jr.
United States Magistrate Judge

IN DISTRICT COURT OF THE UNITE STATES
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
FILED: ASHEVILLE, N.C.
2001 AUG.-6 PM 3:56
U.S. DISTRICT COURT
W. DIST. OF N.C.

CHRISTOPHER LANGDON,
Plaintiff,
vs.
LYNDO TIPPETT, Secretary of Transportation; NORTH CAROLINA DEPARTMENT OF TRANSPORTATION; ROY COOPER, Attorney General; STATE OF NORTH CAROLINA; and NORTH CAROLINA DEPARTMENT OF JUSTICE,
Defendants

CHRISTOPHER LANGDON,
Plaintiff,
vs.
J.J. SWAIN; JACK MURDOCK; F.D. MARTIN; DAVE HENDERSON (ALL CURRENT OR FORMER EMPLOYEES OF THE N.C. DEPARTMENT OF TRANSP.),
Defendants

MEMORANDUM AND ORDER OF DIMISSAL

THESE MATTERS are before the Court on numerous motions filed by the Plaintiff. For the reasons set forth herein, the cases are consolidated and dismissed.

I. CONSOLIDATION

On May 21, 2001, Plaintiff filed Civil No: 1:01cv 107, *Langdon v. Tippett et al.*, ("Tippett"action) in this Court against the North Carolina Department of Transportation (DOT) and other agencies alleging that certain statutes are unconstitutional and seeking declaration thereof. Defendants answered that complaint by asserting that numerous defenses, including *res judicata*. On about June 18, 2001, Plaintiff filed Civil No: 1:01cv139, *Langdon v. Swain, et al.*, ("DOT" action) suing four employees of DOT. Both Lawsuits stem from the same set of facts pursuant to which Plaintiff claims that an inverse condemnation of his real property occurred. Exhibits attached to the Plaintiff's complaints show that beginning in 1995, he became embroiled in a dispute with DOT over the location of a drainage pipe which the Plaintiff claimed destabilized his property and caused a landslide. He also claimed that an earth mass located on his property should be removed by DOT because it presented a

potential danger to users of the road beneath. DOT declined because there had been no activity by the department on or near the Plaintiff' property. DOT also noted that the pipe had been extant for the past 50 years and there was no geological evidence that it was the cause of the landslide. Because of the instability of the earth mass, Plaintiff has been unable to obtain the permits necessary to develop the real estate and hence, claims the land was inversely condemned, his constitutional rights have been violated, and he has been financially damaged.

Federal Rule of Civil Procedure 42 provides for consolidation '"[w]hen actions involve a common question of law or fact...[in order] to avoid unnecessary costs or delay." Fed.R.Civ.P.42(a).

District Courts have the inherent authority to order consolidation *sua sponte*. *Pickle v. CharLee Seafood, Inc.*, 174 F. 3d 444 (4th Cir.1999) (Acknowledging authority although determining inappropriate under the facts). The two pending cases in this Court clearly involve common questions of law and fact and consolidation will avoid unnecessary cost and delay. The under-signed therefore consolidates the actions.

II. *Res Judicata*

In 1998, Plaintiff filed an action in state court against DOT alleging damage to his property and his reputation [sic].

(footnote #1. Either prior to or while this state court action was pending, plaintiff filed three tort claims with the N.C. Industrial Commission. Last year, Plaintiff yet another action against DOT and the same individual Defendants named in this action. *Langdon v. Swain, et al.*, Polk County Superior Court File No. 00 cvs 206. That action contained the same factual allegation as set forth herein and in the previous actions. After the DOT answered and demanded sanctions against the Plaintiff, he voluntarily dismissed the action. Plaintiff also field suit in the state district court for Henderson County alleging state agents had withheld from him public records involving construction on his property.)

Langdon v. North Carolina Dept. of Transp., Polk County Superior Court File No: 98 cvs 139. On January 15, 1999, he signed a release in which, for sum of $2,000, he acknowledged the release to be " a complete bar to all claims or suits for injuries or damages of whatsoever nature resulting from said incident, excepting only the purported inverse condemnation claim set forth in

Christopher Langdon v. North Carolina Department of Transportation, Polk County Superior Court File No. 98 cvs 139." Exhibit 10, attached to DOT Complaint.

As to that claim, the trial court thereafter granted DOT's motion for summary judgment and the North Carolina Court of Appeals affirmed the dismissal of the action without published opinion. *Langdon v. North Carolina Dept. of Transportation*, 138 N.C. App. 553, 556 S.E. 2d 425 (2000).

The undersigned *sua sponte* finds the consolidated cases must be dismissed because they are barred by the doctrine of *res judicata.Arizona v. California*, 530 U.S. 392 (2000) (recognizing *sua sponte* dismissal in the interest of judicial economy).

"*Res Judicata*" precludes the assertion of a claim after a judgment on the merits in a prior suit by the parties or their privies based on the same cause of action. The preclusive affect of a prior judgment extends beyond claims or defenses actually presented in previous litigation, for [n]ot only does *res judicata* bar claims that were raised and fully liigated, it prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in

the prior proceeding." *Meekins v. United Transp. Union*, 946 F. 2d 1054, 1057 (4th Cir. 1991) (citations omitted). Stated simply, "if the latter litigation arises from the same cause of action as the first, then the judgment bars litigation not only of every matter actually adjudicated in th earlier case, but also every claim that might have been presented." *In re Varat Enterprises, Inc.*, 81 F. 3d 1310, 1315 (4th Cir. 1996). In order to be barred by the doctrine, there must be "(1) a final judgement on the merits in a prior suit, (2) anidentity of the cause of action in both the earlier and later suit, and (3) identity of the parties or their privies in the two suits." *Jones v. S.E.C.* 115 F. 3d 1173,1178 (4th Cir.1997). Each of these elements is met here. Plaintiff attempts to create new claims; however, each "new claim arises out of the same transactions or series of transactions as the claim *resolved by the prior judgment*" and, thus are barred because they could have been brought in the earlier action. *Meekins*, 946 F. 2d at 1058.

III. FRIVOLOUS AND MALICIOUS FILING

Moreover, the undersigned finds that the Plaintiff has engaged in a pattern of frivolous

litigation designed to harass the state defendants and the individual employees thereof. Federal Law requires that, "[n]otwithstanding any filing fee... that may have been paid, the court *shall dismiss* the case at any time if the court determines that ...the action...is frivolous or malicious..." 28 U.S.C. Section 1915(e)(2)(emphasis added). The Court is therefore obligated to dismiss such a case. *Carr v. Dvorin*, 171 F. 3d 115, 116 (2nd Cir. 1999).

IV. WARNING AGAINST FUTURE FRIVOLOUS FILINGS

Federal rule of Civil procedure 11 provides in pertinent part: 'By presenting to the court... pleading...an..unrepresented party is certifying that to the best of the person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; (2) the claims...are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law...; (3) the allegations and other factual contentions

have evidentiary support or, ...are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery..." Fed.R.Civ.P.11(b).

Moreover, federal courts have an inherent obligation to protect themselves and the public from malicious and frivolous filings. *Foley v. Fix*, 106 F. 3d 556 (4th Cir. 1997); *Plimpton v. Cooper*, 141 F. Supp. 2d 573 (W.D.N.C.2001). Plaintiff is hereby warned that future filing in this District of a frivolous or malicious action stemming from the facts and circumstances involved in these actions may subject himself to the imposition of sanctions, including an injunction against further filings.

V. ORDER

IT IS, THEREFORE, ORDERED that the above captioned actions are hereby CONSOLIDATED; and IT IS FURTHER ORDERED that the following motions of the Plaintiff are hereby DENIED: (1) the motion for an extension of time to respond to the Defendants answer: (2) the motion for default judgment and request for evidentiary hearing; (3) the motion for hearing and oral arguments; (4) the motion to enjoin note-

holders and trustees;
(5) a notice of appeal which is construed as a motion to certify this matter as an interlocutory appeal; and IT IS FURTHER ORDERED that these actions are hereby DISMISSED WITH PREJUDICE in their entirety.

THIS the 6th day of August, 2001.

" s/_____."
LACEY H. THORNBURGH
UNITED STATES DISTRICT COURT JUDGE

IN DISTRICT COURT OF THE UNITE STATES
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
FILED: ASHEVILLE, N.C.
2001 AUG.-6 PM 3:56
U.S. DISTRICT COURT
W. DIST. OF N.C.

CHRISTOPHER LANGDON,
Plaintiff,
vs.
LYNDO TIPPETT, Secretary of Transportation; NORTH CAROLINA DEPARTMENT OF TRANSPORTATION; ROY COOPER, Attorney General; STATE OF NORTH CAROLINA; and NORTH CAROLINA DEPARTMENT OF JUSTICE,
Defendants

CHRISTOPHER LANGDON,
Plaintiff,
vs.
J.J. SWAIN; JACK MURDOCK; F.D. MARTIN; DAVE HENDERSON (ALL CURRENT OR FORMER EMPLOYEES OF THE N.C. DEPARTMENT OF TRANSP.),
Defendants

ORDER

THESE MATTERS are before the Court on Plaintiff's motions for change of venue, second motion for an extension of time to respond to the Defendant's answer, and to recuse: all the motions are filed in civil action 1:01cv107.

The Court having dismissed these actions by way of an Order of Dismissal file this date. IT IS

THEREFORE ORDERED, that plaintiff's motions are hereby DENIED as moot.

THIS the 6th ay of August, 2001.

"s/_____."
LACY H. THORNBURGH
UNITED STATES DISTRICT COURT JUDGE

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CHRISTOPHER LANGDON,
Plaintiff-Appellant,
v. No:01-1975
J.J. SWAIN; JACK MURDOCK;
F.D MARTIN; DAVE HENDERSON,
All Current or Former Employees
of the N.C. Department of Trans
portation,
Defendants-Appellees.

CHRISTOPHER LANGDON,
Plaintiff-Appellant,
v. No: 01-2019

J.J. SWAIN; JACK MURDOCK,
F.D. MARTIN, DAVE HENDERSON,
And all Current or Former Employees
of the N.C. Dept. of Transportation[sic];
LYNDO TIPPETT, Secretary of
Transportation of the State of N.C.;
NORTH CAROLINA DEPT. OF
TRANSPORTATION; ROY COOPER,
Attorney General of North Carolina;
NORTH CAROLINA DEPT. OF JUSTICE;
THE OFFICE OF THE ATTORNEY
GENERAL OF NORTH CAROLINA,
Defendants-Appellees.

LANGDON v. SWAIN

Appeals from the United States District Court for the Western District of North Carolina, at Asheville.
Max O. Cogburn, Magistrate Judge.
(CA-01-107, CA-01-139)

Submitted: January 31, 2002
Decided :February 20, 2002

Before NIEMEYER and MOTZ, Circuit Judges, and HAMILTON, Senior Circuit Judge

Affirmed by unpublished opinion per curiam

COUNSEL

Christopher Langdon, Appellant Pro Se, Robert Orr Crawford III, NORTH CAROLINA DEPART-MENT OF JUSTICE, Raleigh, North Carolina; Lisa Carol Glover, NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, Raleigh, North Carolina, for Appellees

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM

In these consolidated appeals, Christopher Langdon appeals the district court's dismissal of his two civil actions against the Appellees, seeking 1) to invalidate the state statutes of limitations relied on as defenses to his previous state actions against the Appellees arising from a 1995 landslide on his property, and 2) monetary damages for a taking in violation of the Fifth Amendment. Having reviewed the parties' filings, the district court's opinion and orders, and the record on appeal, we affirm. Additionally, we grant the Appellee's motion to file supplemental materials, deny Langdon's motions for sanctions, deny Langdon's motion to strike Appellee's informal brief, and deny Langdon's motion for default judgment.

Turning to the merits of Langdon's appeal, we find his actions were properly dismissed by the district court. As the district court noted, Langdon's prior state actions named the North Carolina Department of Transportation ("NCDOT") as defendant and addressed issues arising from the same incidents at issue here. However, in federal court Langdon named only the NCDOT in the first complaint and four employees of the NCDOT in the separate complaint alleging an improper taking. We find Langdon's first

action was properly subject to dismissal on the basis of res judicata. *Bockweg v. Anderson*, 428 S.E. 2d 157, 161 (N.C. 1993); *Caswell Realty Assoc. I,L.P. v. Andrews Co.*, 496 S.E. 2d 607, 610 (N.C.Ct.App. 1998). Further, because takings actions sound against governmental entities rather than individual state employees in their individual capacities, *see Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 687 (1978); *see also Kentucky v. Graham*, 473 U.S. 159, 165 (1985), Langdon's second federal suit was properly subject to dismissal either based on res judicata, in light of the complete identity of parties and issue involved, *see Bockweg*, 428 S.E. 2d at 161; *Caswell*, 496 S.E. 2d at 610, or for failure to state a claim. Accordingly, we find no error in the district court's dismissal of Langdon's actions as frivolous or malicious under 28 U.S.C.A. Section 1915(e)(2) (West Supp. 2001).*[* We reiterate the district court's warning that continuing to file frivolous or malicious pleadings in this Court or the district court could lead to the imposition of sanctions under Fed.R.Civ.P.11.

Langdon also raises two additional assignments of error, which we also find to be meritless. First, we find no abuse of discretion in the district court's denial of

Langdon's motion to recuse the district court judge pursuant to 28 U.S.C. Section 455(a) (1994). *United States v. De Temple*, 162 F. 3d 279, 283 (4th Cir. 1998). Second, we find no abuse of discretion in the court's granting Appellees' motion to reopen the period for filing their answer pursuant to Fed.R.Civ.P. 6. *See pioneer Investment Services Co. v. Brunswick Associates Ltd.*, 507 U.S. 380, 392 (1993); *Mendez v. Elliot*, 45 F. 3d75, 79 (4th Cir. 1995).

For these reasons, we affirm the dismissal of Langdon's civil actions and dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court a argument would not aid the decisional process.

AFFIRMED

UNITED STATES DISTRICT COURT
FOR THE FOURTH CIRCUIT
FILED
February 27th, 2002

No. 01-1975
CA-01-107
CA-01-139

CHRISTOPHER LANGDON,
Plaintiff-Appellant
v.
J.J. SWAIN, JACK MURDOCK; F.D. MARTIN; DAVE HENDERSON, And all Current or Former Employees of the N.C. Department of Transportation [sic]
Defendants-Appellees

No. 01-2019
CA-01-139
CA-01-107

CHRISTOPHER LANGDON,
Plaintiff-Appellant
v.
J.J. SWAIN; JACK MURDOCK; F.D. MARTIN; DAVE HENDERSON, AND All Current or Former Employees of the N.C. Department of Transportation [sic]; LYNDO TIPPETT,

Secretary of Transportation of the State of N.C.; NORTH CAROLINA DEPARTMENT OF TRANSPORTATION; ROY COOPER, Attorney General of North Carolina, NORTH CAROLINA DEPARTMENT OF JUSTICE; THE OFFICE OF THE ATTORNEY GENERAL OF NORTH CAROLINA

Defendants-Appellees

ORDER

The appellant has filed a motion for an extension of time in which to file a petition for rehearing and rehearing en banc. The Court denies the motion.

For the Court-By Direction

/s/Patricia S. Connor
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
FILED: March 12th, 2002

NOS. 01-1975(L)
(CA-01-107, CA-01-139)

CHRISTOPHER LANGDON,
PLAINTIFF-APPELLANT,
versus
J.J. SWAIN, et al.,
DEFENDANTS-APPELLEES

ORDER

The court amends its opinion filed February 20, 2002, as follows:

On page 2, section 1, Line 3–"Lacy H. Thornburgh, District judge;" is added.

For the Court-By Direction

/s/ Patricia S. Connor
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
FILED
APRIL 11, 2002
NO. 01-1975
CA-01-107
CA-01-139

CHRISTOPHER LANGDON
PLAINTIFF-APPELLANT

v.

J.J. SWAIN; JACK MURDOCK; F.D. MARTIN; DAVE HENDERSON, And all Current or Former Employees of the N.C. department of Transportation [sic]
DEFENDANTS-APPELLEES

CHRISTOPHER LANGDON; JACK MURDOCK; F.D. MARTIN; DAVE HENDERSON, And All Current or Former Employees of the N.C. Department of Transportation [sic]; LYNDO TIPPETT, Secretary of Transportation of the State of N.C.; NORTH CAROLINA DEPARTMENT OF TRANSPORTATION; ROY COOPER, Attorney General of North Carolina; NORTH CAROLINA DEPARTMENT OF JUSTICE; THE OFFICE OF THE

ATTORNEY GENERAL OF NORTH CAROLINA
Defendants-Appellees

On Petition for Rehearing and
Rehearing En Banc

Appellant's petition for rehearing and rehearing en banc with amendments, motion to supplement the petition for rehearing and rehearing en banc, and second motion to supplement the petition for rehearing an rehearing en banc were submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc.

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor
CLERK

CONSTITUTIONAL PROVISION & STATUTES (FEDERAL)

U.S. Constitutional Amendment I.

" Congress shall make no law...abridging the freedom of speech...or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

U.S. Constitutional Amendment V.

" No person shall be...deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

U.S. Constitutional Amendment XIV.

" No person State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

28 U.S.C., Section 1331. Federal Question

" The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States."

28 U.S.C., Section 1343. Civil Rights and Elective Franchise

" The district court shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in Section 1985 of Title 42 [42 U.S.C., Section 1985].
(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in Section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;
(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United

States;
(4) To recover all damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote...."

28 U.S.C.A, Section 1738. State and Territorial Statutes and Judicial Proceedings; Full Faith and Credit

" The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, territory or possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and possessions as they have by law or usage

in the courts of such State, territory or Possession from which they are taken.

Rule 44(a)(1), Federal Rules of Civil Procedure

" (a) Authentication.
(1) Domestic. An official record kept within.. any state...may be evidenced by an official publication thereof or by a copy attested by the office having the legal custody of the record, or by the officer's deputy, and accompanied by a certificate that such officer has the custody. The certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of the officer's office."

28 U.S.C., Section 1915. Proceedings in forma pauperis

" ...(b)(1) Notwithstanding subsection (a), if a *prisoner* [emphasis added]brings a civil action or files an appeal in forma pauperis, the prisoner shall be required to pay the full

amount of a filing fee. The court shall assess and, when funds exist, ..collect partial payment..
(e)(1) The court may request an attorney to represent any person unable to afford counsel.
(2) Notwithstanding any filing fee, or any portion thereof, that may have been made paid, the court shall dismiss the case at any time if the court determines that---
(A) the allegation of poverty is untrue; or
(B) the action or appeal—
(i) is frivolous or malicious; ..."

<u>28 U.S.C., Section 1983. Civil Action for deprivation of rights.</u>

" Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States, or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an

act or omission taken such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.
For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

42 U.S.C., Section 1985. Conspiracy to interferewith civil rights.

(2) .. .or If two or more persons in any State or Territory conspire for the purpose of impeding, hindering obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection under the laws;
(3) ....If two or more persons in any State or Territory conspire...for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the

constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; ..in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against one or more of the conspirators."

42 U.S.C., Section 1986. Action for neglect to prevent conspiracy

"Every person who, having knowledge that any of the wrong conspired to be done, and mentioned in the preceding section [42 U.S.C., Section 1985], are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses to do so, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which

such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case.."

RULE 55, F.R.CIV.P.

"Rule 55. DEFAULT
(a) When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the default."

LOCAL RULE 7.1(A), (W.D.N.C)

"...Any motions other than for dismissal, summary judgment, or default judgment should show that counsel have met and attempted in good faith to resolve areas of disagreement and set forth which issues remain unresolved."

LOCAL RULE 46(F), U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT

" ...Cases involving pro se litigants are ordinarily not scheduled for oral argument."

N.C. CONSTITUTIONAL PROVISIONS &
N.C. CONSTITUTION, ARTICLE I, SECTION1

" We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness."

N.C CONSTITUTION, ARTICLE I, SECTION 18

" All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial or delay."

N.C CONSTITUTION, ARTICLE 1, SECTION 19

No person shall be... disseized of his freehold liberties, or privileges, or outlawed, or exiled, or
in any manner deprived of his life liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws.."

N.C CONSTITUTION, ARTICLE I, SECTION 25

" In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and shall remain sacred and inviolable."

N.C. CONSTITUTION, ARTICLE I, SECTION 35

" A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty. "

N.C CONSTITUTION, ARTICLE 1, SECTION 36

" The enumeration of rights in this Article shall not be construed to impair or deny others retained by the people."

THE MAGNA CARTA (1215)

" No freeman shall be..disseized unless by the lawful judgment of his peers, or by the law of the land."

CHAPTER 132, Public Records, Sections 132-1 through 132-7

"The public records and public information compiled by the agencies of North Carolina government..are the property of the people. Therefore, it is the policy of this State that the people may obtain copies of their public records and public information free or at minimal cost..Section 132-3...the public official in charge of an having public records shall be the custodian thereof...Section 132-3...Whoever unlawfully removes a public record from the office where it is usually kept ...shall be guilty of a Class 3 misdemeanor ...Section 132-5...Whoever is entitled to the custody of public records shall demand them from any person having illegal possession of them, who shall forthwith deliver the same to him... Section 132-6...Every custodian of public records shall permit any record in the custodians custody to be inspected and examined at reasonable times and under reasonable supervision by any person and shall, as promptly as possible, furnish copies thereof upon payment of any fees as ay be prescribed by law...Section 136.2...Persons requesting copies of public records may request that the copies be certified or uncertified...All public records should be kept in the buildings in which they are ordinarily used."

The constitutionality of the following N.C. General Statutes is challenged in 1:01cv107, W.D.N.C. (Exhibit1): NCGS 136-103, to 112; N.C.G.S. 1-35, 1-51, 40A-51.

N.C.G.S. 1-35

" The State will not sue any person for.. any real property..by reason of the right to title of the State to the same–(1) When the person in possession thereof ..has been in adverse possession thereof for thirty years..(2) When the person in possession thereof...has been in possession under color of title for twenty-one years.."

N.C.G.S. 1-51

" Within five years–
(1) No suit, action or proceeding shall be brought..against a railroad company..for damages or compensation for right of way or use and occupancy of any lands by the company for use of its railroad unless the action or proceeding is commenced within five years after the lands have been entered upon for the purpose of constructing the road, or within to years after it is in operation.

(2) No suit or action or proceeding shall be brought...against any railroad company for damages caused by the construction of the road, or the repairs thereto, unless such suit..is commenced within five years after the cause of action accrues.."

N.C.G.S. 40A-51

"If property has been taken by ...a condemnor listed in G.S. 40A-3(b)or (c)...the owner of the property may initiate an action to seek compensation for the taking. The action may be initiated within 24 months...(c) nothing in this section shall in any manner affect an owner's common law right to bring an action in tort for damage to his property."

N.C.G.S. 136-103

" In case condemnation shall become necessary the Department of Transportation shall institute a civil action..."

N.C.G.S. 136-108

" ...the judge, upon motion..shall..hear and determine any and all issues raised by the pleadings other than the issue of damages,

including, but not limited to,...questions of necessary and proper parties, title to the land, interest taken and area taken."

N.C.G.S. 136-111

" Any person whose land ..has been taken by ...the Department of Transportation...may, within 24 months of the date of the taking of the affected property or interest therein..file a complaint.."

(3) Supreme Court, U.S.
FILED
02 12 JUL 1 2002

No.

In The

Supreme Court of the United States

Christopher Langdon, Petitioner,

v.

Lyndo Tippett, Roy Cooper et al.

consolidated with:

Christopher Langdon, Petititoner,

v.

J.J. Swain, Jack Murdock, F.D. Martin et al.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Fourth Circuit

APPENDIX, PART II, FOR PETITION FOR WRIT OF CERTIORARI

Christopher Langdon
Pro Se
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Winter Park, Fla. 32789
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35 pg

[EXHBIT #1]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION
CASE NO:1:01-CV-107

FILED: 2001 MAY 21
P.M. 2:09
U.S DIST. COURT
W. DIST. OF N.C.

CHRISTOPHER LANGDON,
PLAINTIFF,
v.
LYNDO TIPPETT, SECRETARY OF TRANSP. OF THE STATE OF NORTH CAROLINA; THE NORTH CAROLINA DEPARTMENT OF TRANSPORTATION (NCDOT); ROY COOPER, ATTORNEY GENERAL OF NORTH CAROLINA, THE STATE OF NORTH CAROLINA; THE NORTH CAROLINA DEPARTMENT OF JUSTICE & THE OFFICE OF ATTORNEY GENERAL,
DEFENDANTS

CIVIL RIGHTS COMPLAINT CHALLENGING THE CONSTITUTIONALITY OF NORTH CAROLINA STATUTES & FOR DECLARATORY JUDGEMENT AND INJUNCTIVE RELIEF & INCORPORATED MEMORANDUM OF LAW

(1) The plaintiff hereby seeks to have North Carolina General Statutes 136-103 through 136- 112, NCGS-40A-1, NCGS-1-51, NCGS 1-53 and NCGS –1-35 declared unconstitutional and that an injunction be issued barring the defendants from utilizing those statutes as defenses, or otherwise. The aforesaid statutes deny equal protection under the law, due process of law and a proper procedure for a redress of grievances against the government. Therefore, the aforesaid statutes are in violation of USCA's I, V, & XIV. More specifically:

(2) NCGS 136-111 is unconstitutional because it does away with prior notice before the taking of property and an opportunity to be heard. The only exception to the right to notice and an opportunity to be heard prior to a taking is in emergency situations. *See: Boddie v. Connecticutt,* 401 US 371 at 379 ; Davis v. Scherer, 468 US 183 at 200-201 (1984); *Wisconsin v. Constantineau,* 400 US 433, 91 S. Ct. 507 at 510; *Windsor v. Mc Veigh,* 93 US 274 (1876).

Particularly enlightening is the Court's ruling in *Fuentes v. Shevin,* 407 US 67 at 83, 92 S.Ct. 1983 at 1995 (1972). The Court has repeatedly held that "constructive notice" is not sufficient: *Mullane v. Central Hanover Bank & Trust Co.,* 339 US 306,

314, 70 S.Ct. 652, 657 (1950); *Schroeder v. New York City,* 371 US 208, 83 S.Ct. 279; *Mennonite Board of Missions v. Adams,* 462 US 791,103 S.Ct. 2706 (1983). The lower courts agree: *Miles v. District of Columbia,* 354 F. Supp. 577 (1973), 510 F. 2d 188 (1975). *See also: Caveness v. Raleigh C. & S. R. Co.,* 90 Se 244 at 246(N.C.S.Ct.-1916) The right to prior notice and opportunity to be heard before the taking of one's property is extended to all members of society, even the most downtrodden.

For example, prisoners are allowed prior notice and a hearing before their good time credits are taken away *Wolff v. McDonnell,* 418 US 539, 557 –558 (1974). Mental patients are allowed hearings before being deprived of their civil rights: *Zinermon v. Burch,* 494 US 113, 110 S.Ct. 975 (1990). Those aliens who are charged with being in this country illegally are entitled to notice and a hearing prior to being deported: *Kwang Hai Chew v. Colding,* 73 S. Ct. 472, 344 US 590.

States have always recognized the right to prior notice and opportunity to be heard when one's property is taken by a governmental entity: *See: Bernard v. Brewer,* Virginia Reports, Volume II, {77}, pages 99-100 (1795) (this case was argued by John Marshall as a practicing attorney); *Case of Neeld's Road,* 1 Pa 353 at 355; *Stuart v.*

Palmer, 74 NY-29 Sickels (183) at(190) (New York-1878). North Carolina cases are in agreement: *Phelps v. Chesson,* 34 NC (197), page 189 (1851); *Marshall v. Lovelass,* 1 NC 412; *McMillan v. Robeson County,* 262 NC 413, 137 Se 2d 105 at 108 [4] (1964); *Mc Donald's Corp. v. Dwyer,* 338 NC 445, 450 Se 2d 888 at 891 [6] (1994); *Bowie v. Town of West Jefferson,* 57 Se 2d 369 at 371 [1] (1950); *Beaufort County v. Mayo,* 176 Se 753 at 755 (NC S.Ct.-1934). *Board of Commissioners of Roxboro v. Bumpass,* 233 N.C. 190, 63 Se 2d 144 at 147 [9-12] (1951). Because there is no requirement of prior notice and opportunity to be heard in NCGS 136-111 when the NCDOT takes property, it is in violation of USCA's I, V, & XIV.

(3) Federal law prohibits any federal employee from intentionally making it necessary for a property owner to institute legal proceedings to prove that a taking has occurred. *See:* 27 Am Jur 2d, EMINENT DOMAIN, Sections 826, 1108; 42 USCS 4651 (8); UEDC Section 213; Many states have the same prohibition: Alabama Codes-18-1A-33. The reason for this prohibition is that any government employee must inform a citizen of the taking of that citizen's property if they are aware of the taking. However, NCGS 136-111 has no such

requirement. NCGS 136-111 as written, and as interpreted in the NC courts, allows the NCDOT to simply take a citizen's property and say "sue us." This has happened on numerous occasions in N.C. Therefore, NCGS 136-111 violates USCA's I, V, & XIV.

(4) The Supreme Court of the State of North Carolina has repeatedly held that a statute which allows the taking of property without PRIOR notice and opportunity to be heard is unconstitutional: *Mc Donald's Corp. v. Dwyer,* 338 NC 445, 450 Se 2d 888 at 891 (N.C.S.Ct.-1994); *Bowie v. Town of West Jefferson, supra.* For NC to make an exception to this rule for the NCDOT is not equal protection under the law and due process of law.

There are other state's which agree that statutes which allow the taking of property without prior notice and opportunity to be heard are unconstitutional: *Violet's Heirs et al. v. City Council of Alexandria,* 53 Am St. Rep. 825, 23 Se 909 (Supreme Court of Virginia-1896); *Savannah F. & W. Ry. Co. v. Mayor of Savannah,* 96 Ga. 680 at 680 (Ga.S.Ct.-1895); *Dodd v. Hart,* 68 A. 397 at 397 [1] (Court of Chancery of Deleware-1900); *Janes v. West Puerto De Luna Community Ditch,*169 P. 309 at 310 (Supreme Court of New Mexico-1917); *Re*

Opinion of Justices, 313 Ne 2d 561 (Mass.)

(5) NCGS 136-111 and NCGS 136-112 do not, as far as I am aware, appear in the Index to the N.C. General Statutes. I have checked under "Dept. of Transp.," "Transp. Dept.," "N.C. Dept. of Transp.," " Just Compensation," "Taking," "Inverse Condemnation," "Condemnation" and "Eminent Domain." If NCGS 136-111 is an exclusive remedy, as the courts in NC have ruled, notice that the statute exists must be given. The government can't hide the existence of a statute, expect a citizen to be aware that it exists and then punish them if they don't comply with it. Notice that a statute exists is particularly important for pro se party, particularly if they live in a remote county with no law library. From 1980 to 1998 I lived in Polk county N.C. which has no law library. However, a copy of the NC General Statutes was available.

The failure to include NCGS's 136-111 and 112 in the Index is particularly harmful to pro se parties who can't afford legal representation, thus, it is an economic, class based discrimination. This type of discrimination is unconstitutional: *Harper v. Va. Board of Elections,* 383 US 663 (1966).

The failure to give proper notice to the general public that NCGS 136-111 and 136-

112 exist is a denial of due process of law and equal protection under the law in violation of USCA's I, V and XIV.

(6) NCGS 136-111 states that a property owner may file a complaint within two years of the taking. However, it does not specify what happens when a taking is caused by a series of events over a period of time, rather than by a single event. The US Supreme Court addressed this question in *US v. Dickinson,* 331 US 745, 67 S.Ct. 1382 at 1384-1385 (1947). In that case the Court ruled that when a taking occurs over a period of time, a statute of limitations, if any, does not begin to run until the taking is complete.

The reason for this rule is to avoid premature and multiple lawsuits. *See also Gregorio P.Castro v. U.S.,* 500 F. 2d 436 at 440 (1974); *Barbaccia v. County of Santa Clara,* 451 F. Supp. 260 at 266 (1978); *Juda v. U.S.,* 6 Cl. Ct. 441 (1984); Silverberg *v. U.S.,* 155 Ct. Cl. 436 (1961); *Avery v. U.S.,* 300 F. 2d 640 (1964); *Terteling v. U.S.,* 334 F. 2d 250 (1964); *Pierpont Inn v. California,* 449 P. 2d 737 (1969).

Rather than running any statute of limitations from the time that the taking is complete, the courts in N.C. have been known to run a statute of limitations for a taking from the first injury, no matter how

small it might be, regardless of whether or not the taking is complete: *Robertson v. City of High Point,* 497 Se 2d 300 (N.C. App.-1998). NCGS 136-111, as written and as interpreted, does not ensure that the suggested statute of limitations, if applicable, runs from the last event in the taking, rather than the first, therefore, NCGS 136-111 is in violation of USCA's I, V, & XIV.

(7) NCGS 136-112 states that interest should run from the date of the taking. However, when a taking occurs by a series of events over a period of time, rather than by a single event, the federal courts have ruled that interest should run from the midpoint of the taking: *Drakes B.L. Co. v. U.S.,* 459 F. 2d 504 at 511-512, 198 Ct. Cl. 598 at 608 (1965); *Fonnaledes v. U.S.,* 107 F. Supp. 1019, 1022, 1023, 123 Ct. Cl. 483, 503-504 (1952); *Gregorio Castro v. U.S.,* 500F. 2d 436 at 443 (1974). Therefore, NCGS 136-112 is not constitutional and is in violation of USCA's I, V & XIV.

(8) NCGS 136-111 is unconstitutional because it is too vague. A "taking" has been recognized as substantial damage to a citizen's property which creates a servitude or easement on the property: *U.S. v. Dickinson,* 67 S. Ct. 1382 at 1383 (1947); *Wade v. Car. Tel. & Tel. Co.,*147 N.C. 219, 60 Se

987 at 988 (S.Ct. of N.C.-1908); *Geer v. Durham Water Co.,* 37 Se 474 At 475.

The question is "What amount of damage must be reached to create a taking?" Historically, if the damage to the citizen's property was not substantial enough to be a taking, it was considered a tort and no compensation was available, unless the government had waved its sovereign immunity with regards to tort claims.

" The distinction is made between a 'taking' and 'damage.' Compensation to the owner required as to the former, but not as to the latter." *Kirkpatrick v. City of Jackson-ville D.H.U.D.*,312 So. 2d 487 at 489 (Fla.)

" Continuing trespass or nuisance may ripen into a taking." *City of Jacksonville v. Schumann*, 167 So. 2d 95 at 95 [3] (Fl.-1964).

" Property is not 'taken' within meaning of takings clause of State Constitution if it is simply damaged." *Hawkins v. City of La Grande*, 843 P. 2d 400 (Oregon)

See also: Sanguinetti v. U.S., 264 US 148 at 149 (1924).

Because of the confusion as to what level of damage was necessary to reach the level of a taking, most states now have constitutional amendments which require just compensation for the 'taking' *and* 'damaging' of property by the government.

The first to do so was Illinois in the 1870's. North Carolina is not one of those states. Therefore, a plaintiff must wait until the damage reaches the level of a taking before his cause of action accrues. Unfortunately, North Carolina has at least three different definitions as to what minimum level of damage constitutes a taking:

" And 'taking' under the power of eminent domain may be defined as.. 'informally appropriating or injuriously affecting it [property] in such a way as *substantially* to oust the owner and deprive him of *all* beneficial enjoyment thereof." *Penn v. Coastal*, 231 NC 481at 484 (1950).

Is a taking a complete destruction of value, or is it substantial damage? The quote above contains two different definitions of a taking because it gives two different levels of damage necessary to constitute a taking. Substantial damage can be less than a complete destruction of value, perhaps much less, depending on a particular judge's, or jury's interpretation of the word "substantial." "Substantial" is a subjective term. Some may consider a 10 % diminution in value substantial, others 25%, 50%, or 75%. Is $500 worth of damage substantial? Is $1,000 worth of damage substantial? Is $5,000 worth of damage substantial? The above definition of a

'taking' appears in several NC cases and is cited in the case notes of the NC General Statutes. Another definition of a taking is:

" In inverse condemnation action, prima facie showing of ***substantial*** physical damage measurable in monetary terms is required." *Lea v. N.C. Board of Transp.*, 291 Se 2d 844 at 845 [12] (N.C. App.-1982), 304 Se 2d 164 at 166 [14] (N.C.S.Ct.-1983)

The NC Court of Appeals has further confused the matter by stating in *Robertson v. City of High Point,* 497 Se 2d 300 (1998) that any statute of limitations for inverse condemnation runs from the first injury. One can draw two conclusions from that: (A) The court believes that a 'taking' is a any injury, no matter how small, or; (B) The statute of limitations for a taking can begin running before a cause of action accrues.

For example, if a NCDOT road/dam malfunctions and destroys Mr. Abercrombie's barn, doing $20, 000 worth of damage, the damage would probably be considered substantial enough to be a taking. The statute of limitations, according to *Robertson*, would begin to run when Abercrombie's cause of action accrued.

However, if the same road/dam caused $200 damage to Barnaby's property, the purported statute of limitations would, according to *Robertson,* begin running,

although the damage was not substantial enough to be a taking.

If Barnaby's property was injured again a year later by the same structure in the amount of $400, Barnaby still couldn't sue for a taking. If Barnaby's property was injured again in the amount of $25,000, 26 months after the first injury, Barnaby couldn't sue because, according to *Robertson,* the statute of limitations began to run from the first injury and had expired before his cause of action had accrued. Under *Robertson,* plaintiffs have different time periods, or none at all, for filing.

In states which have constitutional bars against the taking of property, without a bar against damaging property, the courts and plaintiff's are faced with the difficult task of determining when the damage rises to the level of a taking.

" No simple test exists for determining when a taking occurs...a particularized judgment of the facts of the individual case is necessary." *Jensen v. U.S.*, 305 F. 2d 444 (1962)

The *Robertson* rule is a simple rule that is basically a tort rule. However, courts throughout the U.S. have always held that a 'taking' is not a tort.

" Constitutional provision against taking private property ...without adequate compensation..that liability is not in tort."

29A CJS, Eminent Domain, Sect. 375, page 745.

Generally, the federal courts require a high amount of damage to constitute a taking. In *Sanguinetti v. US,* 264 US 148 at 149, the Court cited *US v. Cress,* 243 US 316, in which the value of Cress' property was diminished by 50%, therefore, a "taking" had occurred. I am not asserting that the courts in N.C. must accept the federal levels of damage that trigger a taking. States may be more protective of constitutional rights than the federal government. Many states allow a small level of damage to constitute a taking (I believe S.C. is one).

Whatever level of damage that N.C. decides constitutes a taking, it must be consistent. If a plaintiff is to comply with a statute of limitations for a taking, particularly a pro se plaintiff, there must be a uniform definition of a "taking." In NC it has been defined as a complete destruction of value, a substantial diminution of value and, by inference, a small injury.

Therefore, NCGS 136-111 and NCGS 136-112 are in violation of USCA I, USCA V & USCA XIV.

(9) A more complete definition of a taking is a substantial interference with a property right. Property is not a physical thing but a

bundle of rights; the right to sell, to enjoy, to use and to damage the physical entity, are all property rights. Whenever a government entity exercises one of these property rights, it must pay just compensation. For example, if a government floods private property, it is both using and damaging the property. Joe Smith may flood his own property, even if it diminishes its value. However, the government must pay just compensation if it substantially damages/uses a citizen's property.

Historically, in N.C., whenever a government agency used/damaged private property substantially, without resorting to the statutory condemnation proceedings (particularly notice and opportunity to be heard), the property owner had until the expiration of the period of adverse possession/prescription to file a complaint for just compensation. *State v. Fisher,* 23 SE 158 (Supreme Court of N.C.-1895). Upon payment of just compensation, sometimes called permanent damages, the appropriator acquired an easement/ servitude to continue the damage/use.

A physical invasion of the land was not required, as claimed in *Lea v. BOT, supra.* In *Geer v. Durham Water Co.*, 37 Se 474 the upstream prevention of the normal flow of water to the plaintiff's property was deemed an appropriation of an easement. Because

the appropriator had not used the statutory condemnation procedures, the 20 year time limit of adverse possession/prescription was applicable. This was the ancient, common law remedy under the Magna Carta: *Bowman v. Middleton,* 1 Bay 252 at 253-254 (S.C.-1792). *Mo. & N. A.R. Co. v. Chapman,* 234 Sw 171 (S.Ct. of Ark.-1921). *See also: Caveness v. Railroads* 172 NC 305, 90 Se 244; *Land v. Railroad,* 107 NC 72, 12 Se 125; *Livermon v. Roanoke & T.R.R. Co.,* 109 NC 52, 13 Se 734 (1891); *Query v. Postal Tel. &Tel. Cable Co.,* 101 Se 390 at 391; *Carolina & N.W. R. Co. v. Piedmont Wagon,* 51 Se 2d 301.

Most states (approximately 35) agree that if a government body or a quasi-public corporation appropriates a property interest without utilizing the statutory condemnation procedures, including notice and opportunity to be heard, the plaintiff property owner has the right to file suit for just compensation until the expiration of the period of adverse possession/ prescription. *See: Aylmore v. City of Seattle,* 171 P. 2d 659 (extremely explanatory); *White Pine Lumber Co .v. City of Reno,* 801 P. 2d 1370 (Nevada-1990); *Carter v. Ridge Turnpike Co.,* 208 Pa. 565, 57 A. 988 (1904); *Faulk v. Mo. River & N.W. R. Co.,* 28 SD 1, 132 NW 233 at 237(1911); *Ackerman v.* Port *of Seattle,* 55 Wash. 2d 400, 348 P. 2d

664; *Frustruck v. City of Fairfax,* 28 Cal. R. 357 at 361 [45-48] (1963); *Fairbanks v. N. Stor. Bor. v. Lakeview Enterp.,*897 P. 2d 47 at 54 (Alaska-1995); *Underwood v. Dept. of Transp.,* 849 P. 2d 1113 at 1117 Oklahoma-1993); *Barker v. St. Louis Cnty.,* 104 Sw 2d 371 (Mo.-1937); *Galway v. Metropolitan El. R. Co.,* 28 Ne 2d 479 (NY-1891); *Di Santo v. Warrenville,* 376 Ne 2d 288 at 289 (Ill.-1978);*Gray v. Haas,* 67 Nw 394 (S.Ct. of Iowa-1896); *Tucker v. Chicago, St. P. M. & O. Ry. Co.,* 65 Nw 515 (S.Ct. of Wisconsin-1895); *Schilling v. Carl T. P., Grant Cnty.,* 235 Nw 126 (S.Ct. of N.D.-1931); *Fries v. Wheeling & L.E. Ry. Co.,* 46 Ne 516 (Ohio S.Ct.-1897); *Jinkins v. City of Jal,* 386 P. 2d 599 (N.M.-1963); *Maricopa Cnty. v. Warford,* 206 P. 2d 1168 (Ariz.-1949);*Cheyenne Airport Board v. Rogers,* 707 P. 2d 717 (Wyo.-1985); *Sundell v. Town of New London,* 409 A. 2d 1315 (S.Ct.of N.H.); *Appeal of Kraus,* 618 A. 2d 1070 (Penn.-1992); *Kime v. Cass Cnty.,* 101 Nw 2 (S.Ct. of Nebraska-1902); *Chenevert v. La. St. Dept. of Hwys.,* 345 So 2d 960 at 960 [3] (1977); *Mc Farlan v. Morris Canal & Banking Co.,* 44 NJ Law 471 at 472 (NJ-1882); *Tarrant Co. v. Reid,* 203 Sw 2d 290 at 293 (Texas-1947); *Hiji v. City of Garnett,* 804 P. 2d 950 at 955 (Kansas-1951); *Salt Lake Inv. Co. v. Oregon Short Line Co.,* 148 P. 439 at 441 (S.Ct.of

Utah-1915), citing *Land v. Railroad, supra.*; *Katsos v. Salt Lake City Corp.,* 634 F. Supp. 100 (1986); *Scates v. Indianna Hwy. Comm.,* 383 Ne2d 491 (1978); *Rosenthal v. Crystal Lake,* 525 Ne 2d 1176 (Ill.-1988); *State Hwy Comm. v. Stumbo,* 352 P. 2d 478 at 479 (Ore.-1960); *Di Franzo v. Village of Port Sanilac,* 419 Nw 756 (Mich.-1988); *Yazoo-Mississippi Delta Levee Board v. Dancy,* 3 So. 568 (Miss.-1888).

Further evidence that a plaintiff is not bound by any statute of limitations for a taking is the Supreme Court of N.C.'s ruling in *Hoyle v. City of Charlotte,* 276 NC 292, 172 Se 2d 1(1970).

" The common law action for inverse condemnation has been recognized by this court..." *Hoyle v. City of Charlotte.*" Long v. City of Charlotte, 293 Se 2d 101 at 108 [4] (NCSCt.1982).

" D.C.N.C.-1981. Under North Carolina law, there is no statute of limitations applicable to a claim for just compensation and, thus...plaintiff is entitled to just compensation under the Constitution regardless of when the taking occurs and the time of the is relevant for purposes of valuing just compensation due...*Ocean Acres Ltd.* Partnership *v. Dare Cnty. Board of Health,* 514 F. Supp 1117, affirmed 707 F. 2d 103." West' Federal Digest, key 288 (1) 35 FPD 3d 256.

See also: West's NC Digest, Exhibit 1. Of course, the defendants can cite statutes which state that NCGS 136-111 is an exclusive remedy, including the 2 year suggested statute of limitations. According to Shepherd's Citations, *Hoyle* has never been vacated or overruled. It is clear that NCGS 136-111 is unconstitutional because it violates the rights to due process of law and equal protection under the law as guaranteed in USCA I, V & XIV.

(10) In N.C. the plaintiff is not required to utilize the statutory remedy (and the statute of imitations therein) when the appropriator does not utilize the statutory procedures. *See: Eller v. Board of Education,* 89 Se 2d 144 at 145 [7] (NCSCt-1955); 29A CJS, EMINENT DOMAIN, Section 376, page 747, citing *Lowman v. Abee,* 131 Se 277, 191 NC 147; *Mason v. Commissioners,* 96 Se 110 at 110 [1] (NCSCt-1918); *White v. Nw. N. C. Ry. Co.,* 18 Se 330 at 334 (NCSCt-1893). Other jurisdictions agree: *Hamor and others v. Bar Harbor Water Co.,*78 Me 127, 3 A. 40 at 40 (1886); *De Salvo v. Arkansas La. Gas Co.*, 239 Fed Supp. 312 (E.D..Ark.), cited in 27 Am Jur 2d, Sect. 823, page 341-342; *Cook v.Lehigh Valley R. Co.,* 181NYS 217 at 220 (NY-1920). Also, the cases cited in the previous section (#9) are in agreement. This is

because the statutory condemnation proceedings are in derogation of common right and are mandatory. The condemnor must prove compliance with the mandatory statutory procedures to effect a legal taking. *See: State v. Core Bank Properties,* 275 NC 328, 167 Se 2d 385 at 385 [1] (NCSCt.-1969); *N.C. St. Ports Authority v. South Felt,* 161 Se 2d 47 at 49; *Carolina & Nw.T. Ry. Company v. Penncarden L. & Mfg. Co.,* 44 Se 358, 361 (NCSCt-1903); *City of Charlotte v. McNeely,* 8 NC App. 649, 175 Se 2d 348 at 351 [1-3] (1970); *Cook v. Lehigh Valley R. Co., supra.*; *Bernard v. Brewer,* 2 Wash. 76, Virginia Reports, Volume II, page 99 (1795) (argued by John Marshall).

NCGS 136-103 states that:

" In case condemnation shall become necessary the Department of Transportation shall institute a civil action."

Strangely, the courts in N.C. allow the NCDOT to escape the mandatory statutory requirements in NCGS 136-103 through 136-110.

(11) There is other evidence that NCGS 136-111 is a special law for the NCDOT. It has already been shown herein that in N.C. when the appropriator fails to utilize the mandatory statutory procedures, the plaintiff is not required to utilize the statu-

tory remedy and his right to file a complaint doesn't expire until the end of the period of adverse possession/prescription. In the late 1800'lthe N.C. Legislature passed special laws for some railroad companies which limited the time in which plaintiffs could sue for just compensation for unauthorized takings: *See: Teeter v. Postal Telegraph Co.,* 90 Se 941 at 942 (NCSCt.-1916).

This began the process in which similarly situated plaintiffs were granted different times in which to file complaints for just compensation, depending upon whether there was a taking by private individuals, quasi-public corporations, municipalities or state agencies. Such arbitrary classifications are a denial of due process of law, equal protection under the law and the right to a redress of grievances against the government. Statutory classifications must treat similarly situated individuals alike: *Reed v. Reed,* 404 US 71, 92 S.Ct. 251; *Hooper v. Bernalillo Cnty. Assessor,* 472 US 612, 105 S. Ct. 2862 (1985). This is true with regards to time periods for filing complaints.: *Picket v. Brown,* 462 US 1, 103 S. Ct. 2199 (1983). What NC did was lessen the period of adverse possession/ prescription for some entities, but not all.

NCGS 136-111 is a special limitation for filing complaints against a particular state agency, the NCDOT. It does

not apply to other state agencies, qausi-public corps., municipalities or controversies between private individuals.

Under NCGS 146-24 state agencies, after making an attempt to purchase property from citizens, are authorized to use the condemnation procedures under NCGS 136. NCGS 136-111 does not require that the NCDOT first make an attempt to purchase the property appropriated. Attempts to purchase are notice, albeit not necessarily adequate constitutionally. There is nothing in NCGS 146-24 or NCGS 136-111 that requires property owners whose property rights have been substantially interfered with by state agencies other than the NCDOT, to file a complaint within two years.

For example, if Albert' property is damaged by a road put through his property by the NC Dept. of Corrections without the utilization of the statutory procedures and constitutional safeguards, Albert may treat the taking as legal (See: *Aylmore v. City of Seattle,* 171 P. 2d 659)and prevent the creation of an easement or servitude upon his property, if he files a complaint within 20 years (NCGS 1-40). This might be seven years under NCGS 1-38.

If the same inroads on Albert's property rights are made by a private citizen, he has twenty years, or seven years to file a com-

plaint. If the inroads on his property rights are made by a railroad, he would have 2 or 5 years, depending on the circumstances, to file a complaint under NCGS- 1-51. This statute is vague and contradictory.

If the same inroads on Albert's property rights are made by a quasi-public corporation (railroads excluded) or by a municipality, he has three years in which to file a complaint (NCGS-40A-51). *Robertson v. City of High point, supra.* Under the same circumstances, he has only two years to file a complaint if the inroads on his property rights are made by the NCDOT.

Strangely, the NCDOT can *intentionally* ignore all statutory and constitutional safeguards and put a road through a citizen's property and acquire an easement within two years under NCGS 136-111. *See: Ledford v. N.C .St .Hwy. Comm.* 279 NC 188, 181 Se 2d 466 (1971).

However, the state of N.C. has 30 or 21 years in which to prevent the uncompensated acquirement of an easement upon its property under NCGS-1-35. The only legitimate, constitutionally valid reason for a statute of limitations is to prevent the prosecution of stale claims. However, it is ludicrous to hold that a claim against the state grows sale in two years, while the state's claim under the same circumstances grows stale only after 30 years; that

a claim against this stale after two years, while claims against other state agencies are stale only after twenty years; that a claim against the NCDOT is stale after two years and an identical against a municipality grows stale after three years. Statutes of limitations which discriminate in the favor of governments and against the citizenry are unconstitutional: *Reich v. State Hwy. Dept.,* 194 Nw 2d 700 at 700 [2] (S.Ct. of Mich.-1972); *O'Neil v. City of Parkersburg,* 237 Se 2d 504, 508, 509 (Supreme Court of Appeals of W. Virg.- 1977); *Miller v. Boone Cnty. Hosp.,* 394 Nw 2d 776 at 779 (S.Ct. of Iowa-1986). *Turner v. Staggs,* 510 P. 2d 879 (Nev.S.Ct.-1973), cert. den. 414 US 1079. *Hutchingsv. Kraject,* 215 NE 2d 274 (Ill.-1966); *Lorton v. Brown,* 220 Ne 2d 161.

There are only two reasons for giving plaintiffs a shortened period of time to file complaints against government agencies like the NCDOT, neither of which is constitutional. The first is to save the state money by limiting the number of valid claims pursued: *Hunter v. N. Mason High School,* 539 P. 2d 845, 850 (S.Ct. of Wash.-1975); The second is for the administrative convenience of the NCDOT. NCGS 136-111 allows the NCDOT to avoid all the time and expense of utilizing the statutory procedures in NCGS 136-103 through 136-110. However, administrative convenience is not

a legitimate reason to discriminate in statutes: *Frontiero v. Richardson,* 411 US at 689, 93 S.Ct. at 1772 [3-5] (1973).

I am not stating that the period of adverse possession/prescription is the proper time limit to file a complaint for an appropriation of a property interest by the federal government when the statutory procedures have not been utilized by the federal government. The federal government has no laws or time limits with regards to adverse possession/prescription. The federal government does not allow a citizen to acquire an easement or create a servitude upon federal land at all. The federal government does have one statute of limitations for a taking by the federal government when the statutory condemnation procedures aren't used. That is the six year limitation in the Tucker Act. It applies to all takings without notice, etc., by all federal agencies.

The federal government does not have one statute of limitations for takings by the Dept. of Defense, another for the USDOT and another for the Dept. of Treasury. The federal government does not have one time limit for complaints by citizens for the taking of their property by the government and another for the government to file claims against private citizens to prevent the taking of a property interest, as North

Carolina does.

" Once right or privilege is granted it must be applied equally and indiscriminately." *State v. Stafford*, 164 Se 2d 371 at 372 [15] (N.C.S.Ct.-1968).

Therefore, NCGS 136-111 is in violation of USCA I, USCA V & XIV.

(12) NCGS 136-111 is not constitutional in the way that is interpreted by the courts in NC and as utilized by the defendants. NCGS 136-111 states that a property owner ***"MAY"*** file a complaint within 24 months of the taking. "May" in statutes is permissive. *Felton v. Felton,* 195 Se 533 at 533 [3] (Supreme Court of N.C.-1938) This is particularly true where "may" and "shall" are both used in the statute: *See: Curlee v. National Bank of Fayetville,* 121 Se 194 at 197 (N.C.S.Ct.-1924); *Kelly v. City of Cedar Falls,* 123 Iowa 660, 99 Nw 556 at 557, last paragraph (1904); *Jenney v. Assessors of Mattapoisett,* 76 Ne 2d at 126[2] (Mass.-1947); *Scannel v. City of Seattle,* 648 P. 2d 435, 436 [2] (S.Ct. of Wash.-1982). *Samuel v. American Mortgage Co.,* 78 Sw 2d 1036 at 1037 [3] (Texas-1935); *Moraitis v. Delany,* 46 F. Supp. 425 at 426 [10] (Maryland-1942); *Billings Utility Co. v. Fed. Res. Bank ,* 46 F. Supp. 691 at 692 [5] (1942); *Weiner v. Hospital,* 144 A. 2d 575 at 575 [2]; *Continental Cas. v. Rio Grande Fuel,*

119 P. 2d 618, 618 [1] (1941); *Matter of Fasi,* 634 P. 2d 98 at 101 [4-6](Hawaii-1981); *Federal Land Bank v. Hansen,* 113 F 2d 82 at 84 (1940): *See: Sutherland's Statutory Construction, 5th Edition,* Section 57.11, page 31.

Please note that NCGS 136-107 uses the mandatory "shall" with regards to the statute of limitations therein. It is obvious that the legislature intended that the statute of limitations in136-107 was intended as mandatory and the statute of limitations in 136-111 was intended as permissive.

Further evidence that NCGS 136-111, particularly the statute of limitations therein, is permissive, not mandatory is the fact that there is no penalty for failing to abide by the statute of limitations in 136-111. *See: State v. Schade,* 167 Sw 2d 135 at 136 [8] (Mo.-1943); *Meister v. Moore,* 96 US 76, 24 L. Ed 826 at 826 [1] (1877); *Duthchess Cnty. Mut. Ins. Co. v. Van Wagonen,* 30 Ne 971 at 972 (NY App.-1892); *Juliand v. Rathbone,* 39 NY 369 at 372 (1868); *Sutherland's Statutory Construction,* 5th Ed. (1992-1993), Section 57.08, page 24, last paragraph.

Additional evidence of a permissive interpretation of 136-111 is the fact that there are no negative words in the statute with regards to the statute of limitations, particularly negative words restraining the

filing of a complaint after the suggested 24 months. This is an ancient rule of statutory construction: *See: Townsend's Case,* 75 English Reports 173 at 175, 177, (England-1554 A.D.) *Pond v. Negasus,* 3 Mass 230, 3 Am Dec 131 at 132 (1807); *Dutchess Cnty. Mut. Ins. Co. v. Van Wagonen, supra; Diamond Match Co. v. U.S.,* 181 F. Supp. 952 at 953,959 (1960); *Sutherland's Statutory Construction,* 5th Edition (1992-1993), Section 57.08, page 24, last paragraph. There is a penalty for failing to abide by the statute of limitations in NCGS 136-107, not for NCGS 136-111.

Furthermore, there is nothing in the 136-111 that states that it is the exclusive remedy and that other remedies are repealed. It has already been shown herein that there is a common law remedy for the taking of property without just compensation under the Magna Carta and a remedy under the N.C. Constitution. In fact the term "Law of the Land" in the N.C. Constitution comes from the Magna Carta.

No repeal of the common law is to be presumed, repeal by implication is not acceptable. *See:* 29A CJS, EMINENT DOMAIN, Section 376, p. 747; *Allen v. Standard Crankshaft & Hydraulic Co.,* 210 F. Supp. 844 at 846 [16](W.D.N.C.-1962); *Farrington against Lee,* Case 191, 86 English Reports 1092 at 1092 (England

1600's); *Wetmore v. Tracy,* 14 Wendell 252 at 253 (NY 1835); *Newman v. District of Columbia,* 518 A. 2d 698 at 703 (DC-1968); *Skorpios Properties v. Waage,* 172 Conn. 152, 374 A. 2d 165 (1976); *Hardy v. State,* 482 A. 2d 474 at 474 [1] (Maryland-1984); *U.S. v. Professional Air Traffic Controllers,* 653 F. 2d 1134 at 1135 [5] (1981); *Scharfield v. Richardson,* 133 F. 2d 340 at 341[2-5]; *Sand Key Associates v. Board of Trustees,* 458 So 2d 369 at 369 [4] (Fl.-1984); *Allen v. Houn,* 757 at 757 [4] (Wyo. S. Ct.-1923); *Pineo v. White,* 70 Ne 2d 294 at 295 [16] (Mass.-1946); *Bruce v. Schuyler,* 4 Gilman 221, 46 Am Dec 447 at 448 (Ill.-1847); *Sutherland's Statutory Construction,* 5th Edition; *Hummer v. Schools of City of Hartford,* 112 Ne 2d 891 (Indiana-1953): *Souza v. O'Hara,* 395 A. 2d 1060 at 1060 [4] (S.Ct. of R.I.-1978); *Bolduc v, Herbert Schneider Corp.,* 374 A. 2d 1187 at 1188 [2] (S.Ct. of N.H.-1977); *Ferguson v. Joliet Mass Transit,* 526 F. Supp. 222 at 222 [1] (1981).

Because there is nothing in 136-111 that eliminates the common law remedy under the Magna Carta and the constitutional remedy under the NC Constitution, 136-111 is merely cumulative, not exclusive. *See: City of Zanesville v. Fannan,* 53 Ohio 605; *Juliand v. Rathbone,* 39 NY 369 (1868); *Cook v. Lehigh v. R. Co.,* 181 NYS

217; *Farrington against Lee,* 86 English Reports at 1092 (England 1600's); *City of Atlanta v. Hunnicutt,* 22 Se 130 at 132 (S.Ct. of Ga.- 1894); *City of Rock Hill v. Cothran,* 40 Se 2d 239 at 239 [9] (S.C.S.Ct.- 1946); *Proprietors of Fryeburg Canal v. Frye,* 5 Maine 38 at 43 (1827); *Schuykill Navigation Co. v. McDonough,* 33 Penn 73 at 73 (1859). Therefore, rulings that indicate that NCGS 136-111 is the exclusive remedy for an unauthorized taking by the NCDOT are in violation of USCA I, USCA V & USCA XIV.

(13) According to the courts in NC, before proceedings are taken under NCGS 136-111, the courts are to proceed under NCGS 136-108: *See: Lautenslager v. Board of Transportation,*212 Se 2d 551 at 552 (N.C. App.-1975). However, no mention of NCGS 136-108 is made in NCGS 136-111 and no mention of NCGS 136-111 is made in NCGS 136-108. Therefore, NCGS 136-111 does not give proper notice of what procedures are to be taken under it, denying due process of law and equal protection under the law. In addition, courts in NC have not enforced this rule of law in all situations.

Therefore, NCGS 136-111 violates USCA I, USCA V & USCA XIV.

(14) Returning to *Robertson v. City of*

High point, supra, it should be noted that the NC Court of Appeals ruled that the statute of limitations for a taking runs from the first injury. However, NCGS 136-111 states that the suggested statute of limitations runs from the "taking." The statute never uses the term "first injury" or "injury" at all. In fact NCGS 136-103 through NCGS 136-112 uses some form of the word "taking" 60 times. The term "first injury" never appears in those statutes at all. What the NC Court of Appeals did in *Robertson* was to rewrite the statute and over-throw the legislative intent. Therefore, NCGS 136-111 is in violation of USCA I, USCA V & USCA XIV.

(15) In North Carolina there is a rule of law that a government entity with the power of eminent domain eminent domain shall not plead a statute of limitations as a defense and, at the same time, deny the plaintiff's right to recover. The denial of liability may be a denial of the plaintiff's ownership. See: *Mason v. Commissioners of Durham Cnty.,* 96 Se 110 at 11 (NCSCt.-1918);*Keener v. Asheville,* 177 NC 4, 97 Se 725; *Fleming v. Congleton (Pitt Cnty.),* 177 NC 186, 98 Se 449; *Kistler v. City of Raleigh,* 136 Se 2d at 79 [1] (NCSCT.-1964); " ..where the owner brings an action for damages, the appropriator, by denying

liability for damages and the plaintiff's ownership, may waive its right to insist that the statutory method should have been pursued." 27 Am Jur 2d, Eminent Domain, Section 823, page 341, citing *Rouse v. Kinston*, 188 NC 1, 123 Se 482, 35 ALR 1203.

In *Mason v. Commissioners, supra,* the defendants eventually admitted the plaintiff's ownership. However, because they continued to deny the plaintiff's right to recover, the plaintiff was not required to follow the statutory remedy. However, one court has ruled that this rule does not apply to the NCDOT. See: *Latham v. State Hwy. Commn.,* 131 Se 385 (NCSCt.-1926).

To excuse the NCDOT from the rule of law outlined above is not equal protection under the law and due process of law. Therefore, NCGS 136-111 is in violation of USCA I, USCA V, USCA XIV.

(16) In N.C., certain condemnors, including municipalities, are required to make a good faith effort to purchase property before appropriating it by other means. However, the courts and the N.C. legislature have relieved the NCDOT of this obligation, through the special, discriminatory laws in NCGS 136-103 et seq. See: *City of Charlotte v. Robinson,* 163 Se 2d 289 (1968).

Therefore, NCGS 136-103 through NCGS 136-111 are unconstitutional and in violation of USCA I, V & XIV.

(17) NCGS-1-51 allows the taking of property by a railroad in two years or five years when the statutory condemnation proceedings haven't been followed. It has already been shown herein that the time period for filing complaints for takings outside the statutory method have historically been twenty years. NCGS –1-51 allows the acquirement of an easement in only two years or five years. Property owners in N.C. have 2 years, 3 years, 7 years, 20 years, 21 years or 30 years in which to file a complaint to prevent the uncompensated acquirement of an easement upon their property, depending on who the property owner is and who the acquirer is.

Therefore, NCGS-1-51 is in violation of due process and equal protection under the law in violation of USCA V & USCA XIV.

(18) NCGS 1-52 states that the statute of limitations upon a contract is three years. NCGS-1-53 shortens the statute of limitations to two years for complaints against municipalities upon a contract. Therefore, NCGS-1-53 is a special law for municipalities and denies due process of law and equal protection under

the law, violating USCA I & XIV.

(19) NCGS 40A-51 allows the taking of a property interest, without the use of the mandatory statutory condemnation procedures, in 3 years, which is a different time limit than similarly situated people have under different statutes, as outlined in this complaint.

Therefore, NCGS 40A-51 denies due process of law and equal protection under the law, in violation of USCA I, USCA V & USCA XIV.

(20) NCGS-1-35 gives 21 or 30 years to the state to file a complaint when similarly situated entities in N.C. have considerably less time under other statutes, i.e. 2, 3, 5, 7 or 20 years, as described herein. Therefore, NCGS-1-35 denies due process of law, equal protection under the law in violation of USCA I, USCA V & XIV.

(21) Respectfully, the plaintiff asks for the following relief: (A) That the statute of limitations in NCGS 136-111 be declared unconstitutional and in violation of USCA I, USCA V & USCA XIV, or, alternatively, that the statute of limitations in NCGS 136-111 be declared permissive, not mandatory; (B) That an injunction be issued barring the defendants from pleading the statute of

limitations in NCGS 136-111 as a defense; (C) That NCGS 136-112 be declared unconstitutional and in violation of USCA I, USCA V, & USCA XIV; (D) That an injunction be issued barring the calculating of interest from any date earlier than the midpoint of the taking, when the taking occurs over a period of time, in any complaint for just compensation for the uncompensated taking of property by any entity with the power of condemnation; (E) That the statutes of limitations in NCGS-40A-51, including the 3 year statute of limitations granted by the courts under 40-51, be declared unconstitutional in violation of USCA I, USCA V & USCA XIV; (F) That an injunction be issued barring the defendants, local condemnors, corporations and any other entities from pleading the defense of the 2 or 3 year limitations in NCGS 40A-51; (G) That NCGS –1-51 be declared unconstitutional and in violation of USCA I, V & XIV for the reasons stated in this complaint; (H) That an injunction be issued barring the any entity from pleading the statutes of limitations in NCGS-1-51 as a defense; (I) That NCGS –1-35 be declared unconstitutional and in violation of USCA I, USCA V & USCA XIV for the reasons stated in this complaint; (J) That the defendants be barred from pleading the statutes of limitations in NCGS-1-35 as a defense in

any proceeding; (K) That NCGS 136-103 through 136-110 be declared unconstitutional and in violation of USCA I, V & XIV; (L) That an injunction be issued barring the defendants from pleading any statute of limitations contained in NCGS 136-103 through 136-111 as a defense if the defendants have not made a good faith effort to purchase the property. (M) That NCGS –1-53 be declared unconstitutional and in violation of USCA I, XIV. (N) That an injunction be issued barring any municipality or other entity from pleading the statute of limitations contained in NCGS –1-53; (O) That the court keep in mind that the right to just compensation for the taking of property is a civil right; that civil rights' complaints, particularly those of pro se parties, are to be liberally construed; that statutes providing a remedy for just compensation for the appropriation of property are to be strictly construed with regards to whether or not the common law remedy is abrogated and liberally construed to protect the rights of property owners to just compensation, due process of law and equal protection under the law; that USCA XIV is to be liberally construed to protect the civil rights of US Citizens against state action.

(22) Because the Honorable Lacey Thornburgh was the Attorney

General of the State of North Carolina, I respectfully request that a change of venue be granted and that the matters herein be heard and decided in the Charlotte Division of the Western District.

(23) The plaintiff has been engaged in the real estate development in N.C. and is planning to file a complaint in the Western District of North Carolina against several NCDOT engineers for the taking of his property without just compensation under diversity of citizenship and under federal statutes as well.

I, Christopher Langdon, hereby depose and state, under oath, that the facts herein are true, except those asserted on information and belief, and those matters I believe are true; that I believe that I am entitled to the relief sought herein.

Christopher Langdon, Plaintiff "s/_____."
1835 Edwin Blvd., Winter Park, Fla. 32789-
--407-647-7539
Suscribed to and sworn before me, this the
17th day of May, 2001.
Notary Public "s/_____."
Permanand Bikha
My Commission DD009669
Expires March 15th, 2005

Supreme Court, U.S.
FILED

02 12 JUL 1 _ 2002

No.

In The

Supreme Court of the United States

Christopher Langdon, Petitioner,

v.

Lyndo Tippett, Roy Cooper et al.

consolidated with:

Christopher Langdon, Petititoner,

v.

J.J. Swain, Jack Murdock, F.D. Martin et al.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Fourth Circuit

APPENDIX, PART III, FOR PETITION FOR WRIT OF CERTIORARI

Christopher Langdon
Pro Se
1835 Edwin Blvd.
Winter Park, Fla. 32789
407-647-7539

6893

[EXHIBIT #2]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT
OF NORTH CAROLINA
ASHEVILLE DIVISION
CASE NO: 1:01CV139-T

FILED: ASHEVILLE N.C.,
JUN 18 2001,
U.S. DISTRICT COURT
W. DIST. OF N.C.

CHRISTOPHER LANGDON,
Plaintiff,
v.
J.J. SWAIN, JACK MURDOCK, F.D. MARTIN, DAVE HENDERSON(ALL CURRENT OR FORMER EMPLOYEES OF THE N.C. DEPT. OF TRANSP.,
Defendants

CIVIL RIGHTS COMPLAINT FOR THE TAKING OF PROPERY WITHOUT JUST COMPENSATION, DUE PROCESS OF LAW & EQUAL PROTECTION UNDER THE LAW; FOR THE DESTRUCTION OF A BUSINESS; FOR THE DENIAL OF AND INTERFERENCE WITH CONSTITUTIONAL RIGHTS, STATE & FEDERAL; FOR A TRIAL BY JURY

(1) On 1 July 95 I owned two adjacent tracts

in Polk County North Carolina. The lower lot contained 4.54 acres (Tax Map P-36-60, a.k.a lot 60, Prometheus Point) and the upper lot which contained 2.29acres (Tax Map P-36-63), a total of 6.83 acres. *See:* Exhibit 1. These lots are traversed by NCSR 1116, also known as "Hogback Mtn. Road."

(2) On, or about, 1 July 95 a 15 sq. ft. chunk of dirt broke loose from the bank on the lower end of the 4.54 acre lot. The bank, and the chunk of dirt that broke loose from it, were within the NCDOT's right of way and were also within the boundaries of my property.

(3) I contacted a private road builder who was formerly employed by the NCDOT. He informed me that he believed that the first slide was caused by the steepness of the NCDOT's bank and the placement of the NCDOT's drainpipe uphill from the improperly sloped bank.

(4) I contacted the local maintenance office of the NCDOT and communicated my concern that future sides would eventually occur uphill and spread beyond the right of way. The local maintenance office of the NCDOT took no meaningful corrective measures.

(5) Subsequently, I contacted the District

Engineer of the NCDOT at the time, J.J. Swain. He denied NCDOT responsibility and indicated doubt as to whether or not another slide, or slides, would occur in his letter of 26 July 95 (Exhibit 2).

(6) In his letter of 26 July 95 Swain never indicated that the damage to my property was significant as of that date, nor did he predict that the damage would be significant. On the contrary, his letter tends to infer that the damage wasn't significant as of 26 July 95 and that it would not become significant.

(7) As of August 1st, 1995, only the single, aforementioned 15 sq. ft. chunk of dirt had broken loose from the NCDOT's bank on my property.

(8) Several weeks later, a second smaller chunk broke loose from the NCDOT's bank. I contacted private engineers who told me that the most likely causes of the slides were the steepness of the NCDOT's bank and the NCDOT's drainpipe that was placed uphill from the improperly sloped bank. The drainpipe added hydrostatic pressure to the improperly sloped bank.

(9) The NCDOT continued to deny responsibility despite my making Swain and Murdock (Swain's superior in Raleigh) aware of

the comments of the private engineers. The first excuse given by the NCDOT to shirk its responsibility for the micro-slides was that given by Swain in his letter of 26 July 95. Therein he indicated that the NCDOT was not responsible for the damage to my property because it claimed that it hadn't done any major work on the right of way through my property since 1962. This is a false, fraudulent argument. *See: Sherril v. Hwy. Commn.*, 264 NC 643 (1965). In *Sherril*, the NC Supreme Court cited, with approval, a case where a drainpipe caused the taking of property 50 years after it was installed.

The NCDOT has an ongoing, fiduciary duty to properly slope and maintain its banks and to properly place its drainpipes in order not to damage, or take, private property.

(10) The micro-slides continued within the NCDOT's right of way. Several NCDOT engineers began blaming me for the slides. The engineers made statements, in the public press and in their reports, blaming me because I had cleared a small area of trees for an house site on the property.

(11) Among those blaming me for the slides was Swain. His comments in the Hender-sonville News Times at the time, in effect, blamed me for the micro-slides.

(12) Dennis Allen of the NCDOT, a subor-

dinate of Swain's, blamed me, in effect fo the micro-slides in comments that appeared in the *Tryon Daily Bulletin.*

(13) F. D. Martin made three reports regarding the micro-slides. In one of those reports (Exhibit 3), Martin stated that I should pay for any cleanup costs if the slides should deposit debris on the pavement of NCSR 1116, thereby indicating that he believed that I was responsible for the micro-slides.

(14) Murdock made statements in letters and elsewhere in which he indicated that he believed that I was responsible for the micro-slides.

(15) At the suggestion of Swain, I contacted the North Carolina Department of Environment, Health and natural Resources (NCDEHNR). Mr. Beck from the Asheville Office of that department looked at the property in early1996 and left a message on my answering machine indicating that I hadn't broken any environmental laws and that he believed that the slides were caused by the NCDOT's drainpipe. Mr. Beck put his observations in an affidavit in 1998 (Exhibit 16).

(16) After I communicated the comments of Mr. Beck to swain and Murdock in 1996, the

NCDT came up with a new fraud. They began claiming that the micro-slides were caused by a geological formation. This false argument appeared in the second and third reports of F.D. Martin (Exhibits 4, 5) which were supplied to me by Swain and Murdock.

(17) By 1997 the micro-slides had progressed to the point where 6/10th's of an acre, out of the 6 and 83/100th's of an acre I owned at the time, had been destroyed (.6 out of 6.83).

(18) In 1995 I had Mr. Butler, a licensed surveyor in Polk County, prepare a plat of the area between the NCDOT's bank and the NCDOT's drainpipe. In 1997 I asked him to prepare an updated version of the area showing the extent of the damage to my property as of July 97. I then asked Mr. Butler to draw a line through the NCDOT's drainpipe and down through the area of my property that had been damaged by the slides. The line divided the area where the slides occurred into two almost identical areas (Exhibit 6) of the 3/10th's of an acre each. This rebutted the NCDOT's claim that a geological formation caused the micro-slides. How could a geological formation, possibly tens of thousands of years old, damage my property in two equal portions, one to the right of the NCDOT's drainpipe and one to the left of the NCDOT's drain-

pipe? The plat showed that the NCDOT's drainpipe is the axis of the slides on my property and hence, one of the causes of those slides.

(19) I made copies of the plat (Exhibit 6) and sent them to Swain and Murdock. The NCDOT, nevertheless, continued to deny responsibility for the slides.

(20) The other cause of the slides was the improper sloping of the NCDOT's bank. I asked Mr. Butler, the surveyor, to calculate the slope of the NCDOT's bank from data he had collected in 1995. This showed that the NCDOT's bank was extremely steep, almost vertical (Exhibit 7). Shortly after receiving the report I sent a copy to Swain and to Murdock, to no avail.

(21) I later learned, by accident, that there is a *Design Manual* published by the NCDOT. I was told by one of the authors of the manual, Mr. Shearin, that the NCDOT's bank on my property was not properly sloped according to the NCDOT's standards contained in the *Design Manual* (Exhibit 8).

(22) Swain, Murdock and Martin concealed from me the fact that the NCDOT's bank was not properly sloped according to the NCDOT's own standards.

(23) On 18 September 97, the Polk County Health Department issued a septic tank permit refusal for the 4.54 acres (Exhibit 9). The permit refusal was mailed to me and I received it approximately one week later.

(24) The NCDOT continued to deny responsibility.

(25) In 1998 I filed two complaint against the NCDOT. One complaint was filed in the North Carolina Industrial Commission. The other complaint was filed in the Polk County Clerk of Court's Office (98-cvs-139).

(26) The complaint filed before the N.C.I.C. sought relief for the damage to my reputation due to the false statements made by the engineers. A hearing on a dispositive motion of the NCDOT's was held via telephone in late 1998 or early 1999 with Deputy Commissioner Douglas Berger presiding. The attorney for the NCDOT, Michael Warren, stated during the hearing that any statements made by the NCDOT engineers stating that and/or inferring that I was responsible for the slides on my property were false and that the engineers making those statements knew they were false when they made them.

(27) In 1999 I reached a verbal agreement with Warren, the NCDOT attorney, to accept

$2,000 in exchange for release of all claims for the damage to my reputation.

(28) Subsequently, I receive a written agreement with additional words added to the verbal agreement that had not been discussed. I called Warren who informed me that the additional wording was added to the agreement by T.L. Malonee, an associate of his in the N.C. Dept. of Justice, who was representing the NCDOT in 98-cvs-139.

(29) The additional item in the written agreement (Exhibit 10) was a release of all claims for any damage to my real property by a slide (singular) occurring in June of 1995.

(30) I informed Warren that I would have to think over the agreement with additional wording. I had no discussions with Malonee with regards to what the additional wording that he inserted into the agreement meant.

(31) I signed a copy of the agreement and later tore it up. I then contacted Warren and asked him if the agreement was only for the damage to my reputation and the damage to my land as of 6/95. Warren said yes. I then signed another copy of the agreement and mailed it in. It was my understanding that the agreement was for the damage to my reputation done by the NCDOT engineers and for the damage to my real property by

the NCDOT as of June 1995. I would not have signed and mailed in the agreement otherwise.

(32) I would not have signed and mailed in the agreement if the NCDOT engineers had admitted from the beginning that the NCDOT's bank was not sloped according to NCDOT standards and/or if they had admitted that the NCDOT's drainpipe was one of the causes of the slides.

(33) The NCDOT has made admissions that it was responsible for the slides on my property. Those admissions were made subsequent to the signing of the settlement agreement (Ex. 10). In 98-cvs-139, Malonee stated in his brief that before the NC Court of Appeals "The Defendant-Appellee [the NCDOT] therefore submits that, when it ..came forward with a supporting affidavit establishing that the Plaintiff-Appellant's action accrued in July 1995..." (Exhibit 11, page 16, 3 January 2000). I do not agree with the date that Malonee states that my cause of action against the NCDOT and its engineers did accrue at some point in time, as I have stated herein.

(34) Swain signed an affidavit on February 10th, 1999 (Exhibit 12). In his false affidavit Swain claimed that:
" Based on my discussions with the plaintiff,

my personal inspection of the slide area, my review of Department of Transportation records, and my review of engineering reports...I am of the opinion that as of mid July, 1995, significant slope failure, or sliding had already occurred on the plaintiff's property, and clear evidence existed to suggest that additional failure would occur further up the slope if corrective measures were not taken by the plaintiff. I am also of the opinion, from my discussions with the plaintiff, that he was fully aware of these conditions on his property as of July 95." (Exhibit12, paragraph 10).

The damage to my property was not significant as of July 95 and Swain never told me that he believed that the damage to my property was significant as of July 95. I never indicated that the damage to my property was significant as of July 95. Swain's assertions to the contrary are completely untrue and unsupported by the letter that Swain wrote at the time (Exhibit 2). These are the examples of the fraud utilized by Swain to prevent me from fling a complaint against the NCDOT and against him for compensation for the taking of my property.

(35) In his false affidavit (Exhibit 12, paragraphs 4,5,6) Swain reiterated his allegation that the last work done on the right of way through my property was done

in 1962,which, as I have already shown herein, is completely irrelevant.

(36) In his answer to Interrogatory #3 in my First Set of Interrogatories in 98-cvs-139 (Exhibit 13), Swain stated that he did not know what caused the micro-slides on my property. Swain had previously tried to blame me for the slides, later blaming a geological formation and later stating that he did not know what caused the slides.

(37) It is my contention that there is no statute of limitations for a taking when there is no notice and opportunity to be heard prior to the taking and when the taker does not utilize the statutory remedy. *See: Hoyle v. City of Charlotte*, 293 Se 2d 101 (1970); *Mason v. Commissioners*, 96 Se 110 (N.C.S.Ct.-1918); *Eller v. Board of Educa-tion*, 89 Se 2d 144, 145[7] (N.C.S.Ct.1955); *White v. N.C.R.Co.*, 18 Se 330 at 334; *Low-man v. Abee*, 191 N.C. 147, 131 Se 277.

(38) It is my contention that NCGS 136-111, particularly the statute of limitations contained therein, is unconstitutional. I refer to my complaint (1:01cv107) filed in the Asheville Division of the Western District of North Carolina and incorporate it herein. That complaint contains a detailed argument as to why the statute of limitations in NCGS 136-11 is not constitutional when considered

as mandatory.

(39) No statute of limitations, if there is one, can run while the misrepresentations of the defendants continues. *Walker v. Dickerson*, 560 F. 2d 1184.

(40) The denials by the defendants that the NCDOT was responsible for the slides on my property were, and are, attempts to deny my constitutional rights to a redress of grievances against the government as guaranteed though USCA I, USCA XIV, the NC Constitution, Article I, Sections 18 & 19; The denials of NCDOT responsibility are also violations of 42 USCS 1981, 42 USCS 1983, 42 USCS 1985 and 42 USCS 1986; The denials by the defendants of NCDOT responsibility were, and are, attempts to prevent me from receiving just compensation for the taking of my property by the State of North Carolina, as guaranteed by the Constitution of the State of North Carolina, Article I, Section 19, USCA XIV, 42 USCS 1981, 42 USCS1983; 42 USCS 1985, 42 USCS 1986, the Magna Carta, and the common law.

(41) The false statements of the defendants which blamed me for the slides, or which blamed the slides on a geological formation, or, in which they denied knowledge of what caused the slides, were part of a conspiracy by the defendants to

deny me my right to just compensation for the taking of my property as guaranteed by the N.C. Constitution, Article I, Section 19, U.S.C.A. V, USCA XIV & the Magna Carta and the common law. The false statements regarding the causes of the slides were, and are, fraudulent acts, torts, violating the common law and the NC Gen. Stats.

The statements the defendants which gave false reasons for the slides on my property were also an attempt to prevent me from getting a fair and full redress of my grievances against the State of North Carolina. Therefore, the defendants violated the Magna Carta & the Common Law, the N.C. Constitution, Article I, Sections 18 & 19, USCA XIV, 42 USCS, Sections 1981, 1982, 1983, 1985 and 1986.

(42) The failure of the defendants to properly investigate the slides on my property and to take corrective measures to prevent the destruction of the value of my property, are violations of my right to due process of law, equal protection under the law, and just compensation for the taking of property by the government.

Therefore, the defendants violated my rights under the N.C. Constitution, Article I, Sections 18 & 19; the Magna Carta and the common law; USCA V & USCA XIV; 42 USCS 1981, 42 USCS 1982, 42 USCS 1983, 42 USCS 1985 and 42 USCS 1986.

(45) The plaintiff is aware that there may be rulings that state that 42 USCS 1981, 42 USCS 1982, 42 USCS 1985 and 42 USCS 1986 apply only to the deprivations of rights of minorities. It is the contention of the plaintiff that any such rulings are unconstitutional and in violation of U.S.C.A. XIV because they deny equal protection if they don't apply to all.

(44) In 1999 the defendants agreed to be deposed with regards to my complaint in 98-cvs-139. Subsequently, the defendants reneged on their agreement and refused to be deposed. The defendants have made a deliberate attempt to avoid providing information pertinent to these events, particularly under oath. Swain denied me access to the construction records of the right of way for NCSR 1116 bordering and traversing my property. I did not receive copies of the alleged construction records until 1999, after I discovered the existence of the NC Public Records Law and filed a complaint there under to receive them. It should be noted that Swain, or one of his successors, allowed T.L. Malone, a counsel for the NCDOT, to remove the original records to his office in Asheville, N.C. According to the NC Laws, state records are to be kept in the office in which they are normally used and it is illegal to remove them.

(45) In the year 2000 I filed a complaint against the defendants in the office of the Polk County Clerk of Court, Case # 00-cvs-206 (Exhibit 14). Said complaint is incorporated herein to this complaint. The response of the defendants (Exhibit 15) is also incorporated herein. The defendants have, in essence, admitted the charges made in 00-cvs-206.

(46) I withdrew my complaint in 00-cvs-206 for several reasons. For one, I learned after the filing of the complaint (00-cvs-206) that I could file a complaint against the defendants in the federal courts under diversity of citizenship and under federal law. In addition, the NCDOT has a ban in NC barring me from deposing any of the defendants, a bar which is a clear violation of due process of law and equal protection under the law.

Furthermore, the defendants' attorney had dispositive motion set for a hearing February of 2000. I also had several motions filed to be heard the same day but they were not put on the calendar. I contacted the judge who was to preside over the hearing on the defendants' motion because I had a motion for a con-tinuance filed which I hoped could be heard over the telephone. The presiding judge said such a hearing could not be held without the participation of the defendants' counsel (Mr. Moore) and left messages asking

him to return my calls, to no avail. I had no choice but to ask for a withdrawal without prejudice, which was granted. I had additional motions that were not scheduled that were important to my case.

(47) Plaintiff's should have every opportunity to a full and fair hearing, particularly a pro se plaintiff filing a civil rights complaint. *See: Haines v. Kerner*, 404 U.S. 519 (1972); *Noll v. Carson*, 809 F. 2d 1446 (9th Cir. 1987); *Satchell v. Dillworth*, 745 F. 2d 781, 782[4]; *Roseboro* v.*Garrison*, 528 F. 2d 309 (4th Cir.).

It should be remembered that the right to due process of law , and just compensation when a government entity takes property are all sub-stantive, essential, constitutional, civil rights. Property rights are civil rights: *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1971). Civil rights' complaints are to be liberally construed and are not to be dismissed on technicalities: *See: Copeland v. Desert Inn Hotel*, 673 P. 2d 490 at 490[1-3] (1984); *Kaufmann v. Moss*, 420 F. 2d 1270 at 1276[14] (1970). USCA XIV is to be liberally construed to protect the rights of U.S. citizens. *See: Strauder v. West Virginia*, 100 U.S. 303, 307; *Bell v. Maryland*, 378 US 226 at 289 (1964). Complaints are to be determined on the merits: *See: Foman v. Davis*, 83 S.Ct. 227, 371 U.S.178 at 182 (1962).

My concern in 00-cvs-206 was that I might travel all the way to North Carolina and only the defendants' disparities motion would be heard. That has happened to me once before in 98-cvs-139 when I had several motions that were on the court calendar the same day that the defendant NCDOT had a hearing scheduled for its motion for summary judgment. The NCDOT's motion was heard and granted while my motions were not heard.

So far, I haven't had a full and fair hearing on these matters, hence, there has been no due process of law and equal protection under the law. It should be noted that that this complaint is not an attempt to ask the court to review
any decisions with regards to 98-cvs-139.

(48) The defendants gave no notice and opportunity to be heard before, or after, the taking of my property. The right to notice and opportunity to be heard is an essential constitutional right and an essential common law right. *See: Mc-Donald's Corp. v. Dwyer*, 450 SE 2d 888 at 891 (1994); *Board of Commissioners of Roxboro v. Bumpass et al.*, 233 N.C. 190, 63 SE 2d 144 at 147 (1950); *Bowie v. Town of West Jefferson*, 57 SE 2d at 369[1] (1950); *Stuart v. Palmer*, 30 Am Repts. 289, 74 N.Y. 183, 188; *Windsor v. Mc Veigh*, 93 U.S. 274 (1876); *Bernard v. Brewer*, Virginia Reports,

Volume II, 77, pages 99-100 (1795) (argued by John Marshall): *Phelps v. Chesson*, 34 N.C. (197) page 189 (1851); *Marshall v. Lovelass*, 1 N.C. 412; *Violet's Heirs v. The City Council of Alexandria*, 53 Am St. R. 825, 23 SE 909 at 909 (Va. 1896); *Mc Millan v. Robeson County*, 262 N.C. 413, 137 SE 2d 105 at 108[4] (1964).

The only exception to the constitutional requirement of prior notice and opportunity to be heard is in emergency situations. *See: Fuentes v. Shevin*, 407 U.S. 67 at 83, 92 S.Ct. 1983 at 1995 (1972); *Swan v. Williams*, 2 Mich. 427. The defendants have never alleged any emergency situation which required the defendants to allow the destruction of my property, and hence, its taking, without prior notice.

It should be noted that actual, written notice is required prior to the taking of property and constructive notice is not sufficient. *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306, 314, 70 S.Ct. 652, 657 (1950); *Schroeder v. New York City*, 371 U.S. 208, 83 S.Ct. 279; *Walker v. Hutchinson County*, 352 U.S. 112 at 117 (1956); *Mennonite Board of Missions Adams*, 462 U.S. 791, 103 S.Ct. 2706 (1983); *Miles v. D.C.*, 354 F. Supp. 577 (1973), 510 F. 2d 188 (1975).

The defendants' denials that the NCDOT was responsible for the damage to my property and their denials that the NCDOT

would, or had, taken my property, were denials of notice and opportunity to be heard. Hence, the defendants denied me due process of law and equal protection under the law as guaranteed by the Constitution of the State of N.C., Article I, Sections 18 & 19; The Magna Carta and the Common Law; U.S.C.A. XIV; 42 U.S.C.S. 1981, 42 U.S.C.S. 1982, 42 U.S.C.S. 1983, 42 U.S.C.S. 1985 and 42 U.S.C.S. 1986.

(49) Statutes authorizing the power of Eminent Domain are in derogation of common right and are to be strictly construed. A government appropriator is supposed to prove compliance with the statutory procedures: *City of Charlotte v. Mc Neely*, 175 SE 2d 348, 351[1-3] (1970); *N.C. St. Ports Authority v. So. Felt*, 161 SE 2d 47 at 49; *State v. Core Banks*, 167 SE 2d 385 at 385 [1-2] (N.C.1969); *Sharp v. Johnson*, 4 Hill 92, 40 Am Dec. 259 at 263 (N.Y. 1843); *Bernard v. Brewer*, 2 Washington 76, Va. Reports, Volume II, page 99 (Va. 17950 (argued by John Marshall); *Chapell v. U.S.*, 81 F. 764 at 766 (1897); *Cincinatti v.Vester*, 281 U.S. 439, 50 S.Ct. 360 at 360[5] (1930).

The failure of the NCDOT to institute condemnation proceedings against my property was a denial of due process of law and equal protection under the law as guaranteed by the Magna Carta and the

Common Law; the Constitution of the State of N.C., Article I, Sections 18 & 19; U.S.C.A. XIV; 42 U.S.C, Section 1981, 1982, 1983, 1985 and 1986.

(50) The failure of the defendants to admit responsibility for the damage to, and the taking of, my property; The failure of the defendants to give notice and opportunity to be heard prior to, or subsequent to, the taking of my property; and the failure of the defendants to institute condemnation proceedings and/or to take corrective measures to prevent the damage and the eventual taking of my property were, and are discriminatory acts. Most people in N.C. get due process of law and equal protection under the law when their property is taken; they get all the constitutional, common law and statutory protections which have been denied to me.

The denial of my constitutional rights and common law rights, as described herein, placed a heavy economic burden upon me. Whenever, the NCDOT takes property, denies the taking and doesn't utilize the proper condemnation procedures, it places a heavy economic burden upon the affected property owner.

The affected property owner will have to supply, at his own expense: surveys, plats, engineering reports and pay for an attorney, which is prohibitively expensive for most

people. This places a particularly heavy, often in surmountable burden upon those with the least financial resources. There is a pattern of discrimination against those of lesser financial resources by the NCDOT. Those who can afford an attorneys and have political influence within the NCDOT have a much better chance of promptly receiving just compensation. Class based, economic discrimination, particularly when involving substantial constitutional rights, is unconstitutional. *See Harper v. Virginia Board of Elections*, 383 U.S. 663 (1965).

Therefore, the failure of the defendants to condemn my property, was a denial of due process of law and equal protection under the law, and hence, a violation of the Constitution of the State of North Carolina , Article I, Sections 18 & 19; the Magna Carta and the Common Law; U.S.C.A. XIV; 42 U.S.C.S., Sections 1981, 1982, 1983, 1985 and 1986.

(51) In North Carolina, due process of law and equal protection under the law, require that payment is made prior to the taking of property. *See: Hines v. City of Rocky Mount*, 162 N.C. 409, 78 SE 510; *University v. Foy*, 5 N.C. (58) at (63), page 58 (N.C. 1805) The failure by the defendants to pay me just compensation for the taking of my property, as well as the conspiracy by the defendants to prevent me from receiving just compensation for the taking of my property , as well

as the conspiracy by the defendants to prevent me from receiving just compensation for my property which has been destroyed in value, is a denial of my rights under the Magna Carta and the Common Law; the N.C. Constitution, Article I, Sections 18 & 19; U.S.C.A. V. & XIV; 42 U.S.C.S. Sections 1981, 1982, 1983 1985 & 1986.

(52) The defendants actions and inaction caused a destruction of my real estate development and sales business. Prior to the events described herein, in 1994, I made over $40,000 in income from real estate activities. Since then I have made nothing from real estate activities. All of my available cash was invested in the 6-83 acres which the NCDOT rendered useless. The defendants tortuously interfered with my right to enter into contracts to sell my property and, hence, to purchase other properties, subdivide and resell them.

Furthermore, the right to earn a living is a constitutional right. *See: Truax v. Corrigan*, 257 U.S. 312, 42 S.Ct. 124 (1921). This right is guaranteed by the Constitution of the State of N.C., Article I, Section 1. *See: State v. Balance* 229 N.C. 764, 51 SE 2d 731 (1949); *Treats Enterps., Inc. v. Onslow County*, 83 N.C. App. 345, 350 SE 2d 365 (1986).

When the defendants took my business they took a substantial, constitutionally

protected property right, thereby violating the Magna Carta & the Common Law; the N.C. Constitution, Article I, Sections 18 & 19; U.S.C.A. I, V & XIV; 42 U.S.C.S., Sections 1981, 1982, 1983, 1985 &1986.

(53) The actions of the defendants and their inaction, as described herein, caused mea great deal of emotional distress and physical pain and suffering. I lost my car, most of my possessions and my good credit. Prior to these events, I had four Visa and/or Master Cards, a Sears Credit Card and gasoline credit cards. I had difficulty making a living because I had lost my car. By the time I had saved enough money to purchase another car, I no longer had a place to live. I had to live in my car during a harsh winter.

The false statements by the defendants that attempted to shift the blame for the slides onto me, particularly those statements that appeared in the local press, caused me, and my business, a great deal of harm. I was portrayed as a destroyer of the environment when, in reality, the defendants were responsible for the slides because they failed to take corrective action. I was harassed in the press, in person, and on the telephone.

Ironically, I was the catalyst for the state's purchase of 2000 acres for wildlife in Polk County. I didn't receive a commission for the sale. Prior to these events, I and my former partners had donated over $20,000 to

the NCDOT to pave "Dark Corners Road."

(54) The plaintiff has been a resident of Florida since 16 August 1999. Therefore, the plaintiff asks that the issues of this case be decided, and relief granted, under N.C. Law, under diversity of citizenship. In addition, the plaintiff asks that any relief asked for, but is not granted under N.C. law, be heard under federal law.

(55) This complaint is not a suit against the State of North Carolina; It is a suit against the defendants individually. The defendants acted under the color of state law.

(56) The plaintiff hereby requests a jury trial upon all issues. Under N.C. law, a party to a complaint has the right to a jury trial under the Constitution of the State of North Carolina, Article I, Section 25 for complaints involving property. In addition, under N.C. Law a party to a complaint has the right to a jury trial for deprivations of constitutional rights.

" ...by the constitution every citizen had undoubtedly a right to a decision of his property by a trial by jury...that if the Legislature could take away this right, and require him to stand condemned in his property without a jury trial, it might with as much authority require his life to be taken

away without a trial by jury." Bayard *v.* *Singleton*, 1 Martin 48 (N.C. 1787) cited in *Hoke v. Henderson*, 15 N.C. 1, 25 Am Dec at 689 (1833).

" ...acts inconsistent with the rights of freemen as declared in the Constitution, which takes away their constitutional privileges.. without a previous trial by jury..are not laws of the land." *Cruden v. Neale*, 2 N.C. (341), page 441 (1796).

(57) Therefore, the plaintiff respectfully requests the following relief: $77, 179.00 compensatory damages for the taking of my real property (6.83 acres) in Polk County, N.C. and interest thereon; Payment for the taking of my business in the amount of $40,000 per year from whatever date is appropriate; $200,000 in compensatory damages for the reckless, callous and malicious deprivation my Common Law and Constitutional rights and the pain, suffering and emotional distress caused by the defendants; $50,000 in paralegal expenses for the work done by me with regards to this matter; $300,000 in exemplary and punitive damages; Any and all survey expenses, engineering expenses, mailing costs, copy expenses, attorney's fees, court costs, stationary expenses, travel expenses, notary expenses, and all other expenses; any other relief that is deemed just.

Christopher Langdon, Plaintiff
"s/_____."
1835 Edwin Blvd., Winter Park, Fl. 32789---
407-647-7539
VERIFICATION OF COMPLAINT AGAINST NCDOT ENGINEERS- I, Christopher Langdon, being duly sworn, hereby depose and state that: I am the plaintiff in this action and author of this complaint; that the contents are true of my own knowledge, except those matters alleged on information and belief, and those matters I believe are true.

Christopher Langdon, Plaintiff
"s/_____".
Suscribed to and sworn before me, after producing Florida Driver's License # L523-104-51-385-0, this the 8th day of June, 2001.
Notary Public "s/_____."
Yvonne I. Bhikha
MY COMMISSION # CC804494
EXPIRES: May 24th, 2003
Bonded Thru Notary Public Underwriters

{Exhibit #3}

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
ASHEVILLE DIVISION
NO:1:01-CV-139-T

CHRISTOPHER LANGDON,
PLAINTIFF,

V.

J.J. SWAIN,

F.D. MARTIN,
JACK MURDOCK,
DEFENDANTS

AMENDED MOTION
FOR EXTENSION OF
TIME TO ANSWER

Fed.R.Civ.P.6(b)

NOW COMES Defendant Jack Murdock, through counsel, and moves to amend his Motion for an extension of Time To Answer, and moves the court pursuant to Rule 6(b) of the Federal Rules of Civil Procedure to extend the time within which he may answer, move or otherwise plead for an additional thirty (30) days, up to and including August 17, 2001.

In support thereof, counsel shows unto the court the following:

(1) On June 8, 2001, Plaintiff filed a Summons and Complaint against Defendants in the United States District Court, Western District of North Carolina, captioned as Case

Number 1:01-cv-139-T.
(2) Plaintiff alleges an inverse condemnation of his property and seeks over $600,000 in damages.
(3) On July 19, 2001, Defendant served by mail a Motion for Extension of Time to Answer.
(4) Said motion incorrectly stated that the Summons and Complaint in the instant case "were served by certified mail on J.J. Swain on July 2, 2001, and the other defendants were similarly served at various times thereafter."
(5) Counsel has since determined that J.J. Swain and F.D. Martin were in fact served on June 29, 2001, while Jack Murdock was served on June 28, 2001.
(6) Jack Murdock is a retired employee of the North Carolina Department of Transportation (NCDOT). Plaintiff's complaint arises out of actions occurring while Mr. Murdock was employed by the NCDOT. The Attorney General's Office is representing Mr. Murdock in this action.
(7) Mr. Murdock mistakenly disposed of Plaintiff's complaint when first received by him, as he believed it was related to an earlier case filed by Plaintiff in state court.
(8) Mr. Murdock would be greatly prejudiced by a default judgment in this case.
(9) Additional time is needed to thoroughly investigate this matter in order to properly prepare an answer or other appropriate responsive pleading.

(10) The time for answering expired on July 18, 2001. Defendant's original motion was served on July 19, 2001.

WHEREFORE, Defendants respectfully requests that this Amended Motion to Extend Time to Answer be allowed.

This the 20th day of July, 2001.

ROY COOPER
ATTORNEY GENERAL

By "s/_____".
Robert O. Crawford, III
Special Deputy Attorney General
N.C. State Bar No. 12373
N.C. Dept. of Transp.
Attorney General's Office
1505 Mail Service Center
Raleigh, NC 27699-1505
Telephone: (919) 733-3316
ATTORNEYS FOR DEFENDANTS

{Exhibit # 4}

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
ASHEVILLE DIVISION

CHRISTOPHER LANGDON,
PLAINTIFF,

V.

J.J. SWAIN,
F.D. MARTIN,
And JACK MURDOCK,
DEFENDANTS

AMENDED MOTION

FOR EXTENSION OF

TIME TO ANSWER
Fed.R.Civ.P.6(b)

NOW COMES Defendants J.J. Swain and F.D. Martin, through counsel, and move to amend their Motion for an Extension of Time to Answer, and move the court pursuant to Rule 6(b) of the Federal Rules of Civil Procedure to extend the time within which they may answer, move, or otherwise plead in response to Plaintiff's complaint, for an additional thirty (30) days, up to and including August 17, 2001.

In support thereof, counsel shows unto the court the following:

(1) On June 18th, 2001, Plaintiff filed a Summons and complaint against Defendants in United States District Court, Western District of North Carolina, Captioned as Case Number

1:01-cv-139-T.

(2) Plaintiff alleges an inverse condemnation of his property and seeks over $600,000 in damages.

(3) On July 19, 2001, Defendants served by Mail a Motion for an Extension of Time to Answer.

(4) Said motion incorrectly stated that the Summons and Complaint in the instant case "were served by certified mail on J.J. Swain on July 2, 2001, and other Defendants were similarly served at various times thereafter."

(5) Counsel ahs since determined that J.J. Swain and F.D. Martin were in fact served on June 29, 2001, while Jack Murdock was served on June 28, 2001.

(6) Additional time is needed to thoroughly investigate this matter in order to properly prepare an answer or other responsive pleading.

(7) The time for answering had not expired as of the date of the original motion.

WHEREFORE, Defendants respectfully request that this Amended Motion to Extend the Time to Answer be allowed.

This the 20th day of July, 2001.

ROY Cooper
ATTORNEY GENERAL
By "s/_____".
Robert O. Crawford III
Special Deputy Attorney General
N.C. State Bar No: 12373
N.C. Dept. of Transp., Attorney General's Office,

1505 Mail Service Center, Raleigh, NC 27699-1505: Telephone: (919) 733-3316
Attorneys for Defendants

[EXHIBIT #5]

BLE
BUNNELL-LAMMONS ENGINEERING
GEOTECHNICAL, ENVIRONMENTAL
AND CONSTRUCTION MATERIALS
CONSULTANTS

January 8, 2002
Mr. Chris Langdon
1835 Edwin Blvd.
Winter Park, Florida 32789

Subject: Tryon Slope
Tryon, N.C.
BLE Project No. J01-1352-02

Mr. Langdon,

In response to your letter of November 23, 2001, we are providing this letter summarizing our observations of an active slope failure on your property in Polk County, North Carolina. Our Bill Matthews, P.E., conducted site observations on two occasions. The first observations were conducted on August 10, 1995 while Mr. Matthews was employed by Law Engineering, Inc. (reference Law Project No. 30220-5-

7105.01 letter dated September 14th, 1995). His subsequent observations of the site were conducted on January 25, 1999 while employed with Bunnell-Lammons Engineering, Inc. (reference BLE Project no. J99-1352-01 letter dated February 10, 1999). A summary of the observations and opinions based on these two site visits are presented below.

The amount of property adversely affected by the slope failure was considerably greater in January 1999 than when first observed in August 1995.

Although we have not performed site specific sub-surface exploration, laboratory tests or detailed slope stability analyses, based on our previous experience it is our opinion that two of the most significant factors affecting the stability of this slope are:
(1) The relatively steep earthwork cuts at the toe of the embankment, apparently performed as part of the prior road construction activities.
(2) The concentration of surface water runoff in the slide area resulting from the corrugated metal drainage pipe passing beneath the roadway and discharging flow near the top of the slide area (as observed in January 1999).

A detailed site exploration, laboratory

testing and slope analyses would be required to adequately evaluate the stability of the slope. However, it is certainly true that with all other factors being the same, the activities at the this site (excavation of the toe of the slope and concentration of surface water near the crest of the slide zone) have served to reduce the stability of this slope and expedite the observed slope failure. Failures of this type tend to get progressively worse and it is likely that the upper end of the sliding mass of soil could eventually encompass Hogback Mountain Road unless remedial measures are taken to stabilize the slope.

As mentioned previously, the opinions expressed herein are based on site visits conducted in 1995 and 1999. We have not conducted additional site visits other than mentioned herein and we cannot attest to the current state of the slope or how it has changed since last observed on January 25, 1999.

We appreciate the opportunity to provide our professional services on this project. If you have any questions or require additional

assistance, please call.

Sincerely,
BUNNELL-LAMMONS ENGINEERING, INC.
"s/_____." 1/8/02
William A. Matthews, P.E.
Chief Engineer
Registered, N.C. # 18375
Copy: Dan Bunnell

[EXHIBIT#6]

STATE OF NORTH CAROLINA	SUPERIOR COURT DIVISION
POLK COUNTY	98-CVS-139

AFFIDAVIT

CHRISTOPHER LANGDON,
PLAINTIFF,

vs.

THE N.C DEPT. OF TRANSPORTATION

I, Mr. William Beck of the NCDEHNR, being duly sworn, deposes and says:

(1) I visited the site of the slope failure on Mr. Langdon's property in Polk County on Hogback Mtn Rd. in early 1996. I saw no evidence that Mr. Langdon had broken any environmental laws which we administer. I saw no evidence that he had done anything to disturb the soil. Some trees had been cut but the stumps had been left and the underbrush remained.

(2) It appeared to me that the slope failure might have been caused by a drainage pipe. However, I am not an engineer and can not

say so with certainty.

This the 11th day of March, 1999.

"s/_____"

William Beck

Sworn to and suscribed before me, this the 11th day of march, 1999.

"S/_____."

Anne H. Gaddey

Notary Public

My commission expires 4-22-00

[Exhibit # 7]

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT
CASE NO: 01-1975
(FORMERLY 01-2019,
CA-01-139, CA-01-107]

FILED
OCT 02 2001
U.S. Court of Appeals
Fourth Circuit

CHRISTOPHER LANGDON,
Plaintiff,
versus
J.J. SWAIN, JACK MURDOCK, F.D MARTIN,
Defendants

CHRISTOPHER LANGDON,
Plaintiff-
versus
LYNDO TIPPETT, et al.
Defendants

INFORMAL BRIEF REGARDING THE GRANTING AN EXTENSION OF TIME TO RESPOND TO DEFENDANTS MURDOCK, SWAIN & MARTIN AND THE FAILURE TO FILE AND ENTRY OF DEFAULT AND GRANT A DEFAULT JUDGMENT

[EDITED]

" The entry of default is not discretionary, it is mandatory, evidenced by the use of the word 'shall' [Rule 55(a), F.R.Civ.P.] rather than the permissive, discretionary, "may." I believe that the failure to enter the default is the result of prejudice against me because my suit is against state employees defended by the State of N.C. and because I am proceeding, through no choice of my own, pro se." [page 2, original format]

" I did allege that my property was 'taken' without just compensation, that the defendants used fraud to conceal that fact and that they blocked my right to access to the courts, my right to due process of law and equal protection under the law." [page 4 (all page numbers are for the original format)]

"...the counsel for the defendant[s] never alleged "excusable neglect" or "good cause shown" in any of the three motions he filed for an extension of time. Therefore, all three motions should have been denied and struck, and default judgment and entry should have been entered against the defendants. However, should the Honorable Court of Appeals, over my objections, require that I must provide arguments with regards to

excusable neglect in order to prevail, I will.

The defendants'.. 'amended motion' states in paragraph 7: 'Mr. Murdock mistakenly disposed of Plaintiff's complaint when first received by him, as he believed that it was related to an earlier case filed by Plaintiff in state court.' It is clear that Murdock knew that the summons and complaint were court documents when he 'disposed' of them. That alone shows contempt for the judicial system. It certainly doesn't indicate 'excusable neglect. ...Furthermore, I don't believe that Murdock beleived that the documents were related to a state case, rather than a federal case... Murdock knew that the documents were related to a case. To have known that, Murdock must have opened the envelope. When he opened the envelope, Murdock clearly saw that the Summons and the Complaint were for a case in the U.S. District Court, not in a state court. I believe that the statement that Murdock thought the papers were for a state court proceeding was made for an improper purpose, sanctionable by granting the motion for default entry and judgment.. I also believe that Murdock wanted to default. ....Murdock' deliberate 'disposal' of the legal documents does not explain why R. Crawford did not file a response, or, a timely motion for an extension of time to respond. He was

aware of the complaint as of 9 July 2001, if not sooner, and he had an opportunity on that date , during our phone conversation re 1:01cv107, to ask when the summons and complaint were served in 1:01cv139, and to discuss any motion for an extension of time to answer. He did not do so....R. Crawford never consulted with me before filing any of his motions, contrary to the local rules."[pages 5-6].

"..to get an extension of time after the time for responding had expired, he was required to assert that the defendants had a meritorious defense and that I would not be prejudiced by said extension of time...It should also be noted that the defendants were in default, whether the default was physically entered in the records of the W.D.N.C. Asheville, or not." [page 7].

" I made very effort to get the NCDOT engineers to take responsibility for their failure to properly maintain the NCDOT right of way. Their failure to do so led to the destruction of my property and my real estate business in I have not sold a single piece of property in N.C. since... I lost my car and my credit cards. I had impeccable credit, prior to these events... One woman was encouraged by Murdock to believe that I was responsible for

the slides....[NCDOT Attorney Michael] Warren admitted that the statements by the engineers [Swain, Martin and Murdock] that indicated that I was responsible for the slides were false and that they knew they were false. I have made verified statements to that effect... Mr. Warren has never denied these facts, although he has had plenty of opportunity to do so. No one from the NCDOT/ N.C. Dept. of Justice has ever presented any affidavit by him to the contrary in any court proceedings..or anywhere else." [pages 12- 13]

" ....I did everything I could to get the defendants to take responsibility. Instead, the NCDOT suggested that I build a retaining wall within their right of way and move their drainpipe, at my expense. In his letter of 26 July 95, swain alludes to that, stating that I should get his permission before engaging in the construction activity...It should also be noted that the NCDOT engineers withheld from me the fact that their bank, which was on my property, and within their right of way, was not sloped according to NCDOT standards in their design manual. That is why the attorneys for the NCDOT have blocked every effort I have made in other court proceedings to have the engineers deposed." [page 20]

" The attorneys for the NCDOT have done

everything to have the possible to prevent me from having the NCDT engineers deposed. The NCDOT engineers reneged on an agreement I had with them to be deposed. Obviously they are hiding something. What they are hiding is the fact that the NCDOT bank was not sloped according to their own standards, which combined with the drainpipe above it, caused it to fail.

You can see why the NCDOT engineers do not want to testify under oath. Perhaps that is why Murdock disposed of the Complaint and Summons. Perhaps his conscience was bothering him as well, and he wanted to default." [pages 20-21]

" Therefore, the plaintiff respectfully requests that.. the Honorable U.S. Court of Appeals utilize the rule of law which allows the papers of pro se parties to be liberally construed." [page 21-22]

I, Christopher Langdon, hereby solemnly affirm that I am the author of this complaint and that everything contained herein is true and correct, except those matters asserted on information and belief, and those matters I believe to be correct and true.

Christopher Langdon
Plaintifff-Appellant "s/_____".

I hereby certify that I have mailed a copy of this informal brief and attached papers to: R. Crawford III, 1505 Mail Service Center, Raleigh,N.C. 27699-1505; The Clerk of Court, The U.S. Court of Appeals, Fourth Circuit, 1100 E. Main St., Suite 501, Richmond, Va. 23219-3517, this the 1st day of Oct., 2001

Sworn to and suscribed before me, this the 1st day of October, 2001

Notary public "s/_____".

Shirley Frere
MY COMMISSION EXPIRES
JULY 16, 2005
#DD042430
Bonded Thru Troy Fain Insurance

[Exhibit #8]

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT
CASE NO: 01-1975
(FORMERLY 01-2019, CA-01-139, CA-01-107)
FILED
0CT 02 2001
Fourth Circuit
U.S. Court of Appeals

CHRISTOPHER LANGDON,
Plaintiff,
v.
LYNDO TIPPETT et alia,
Defendants

CHRISTOPHER LANGDON,
Plaintiff,
v.
J,J, SWAIN et alia,
Defendants

INFORMAL BRIEF REGARDING THE SECOND APPEAL TO THE UNITED STATES DISTRICT COURT OF APPEALS, FOURTH CIRCUIT, FROM THE U.S DISTRICT COURT, W.D.N.C., ASHEVILLE DIVISION

[EDITED]

" I am not proceeding pro se choice, but because the defendants have destroyed my property and my livelihood, thereby preventing me from hiring an attorney." [page 1]

" I have been subjected to undisguised hostility by judges in N.C., both state and federal...I have never gotten a fair hearing on any matter contained herein, or on any related matter." [page 2]

" I am stating that I doubt that Judge Thornburgh can be impartial in these matters. I believe that events subsequent to the filing of my motion to recuse clearly indicate Judge Thornburgh's bias." [page 4]

" The bias of Judge Thornburgh is clearly visible from his actions...The right to a fair and impartial tribunal is an important, fundamental constitutional right.

' The Due process clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases...The neutrality requirement helps to guaranty that life, liberty, or property will not be taken on the basis of erroneous or distorted conceptions of facts of law..it preserves both the appearance and the reality of fairness..by ensuring that arbiter is not predisposed against him. The requirement of neutrality has been jealously

guarded by this Court...and this 'stringent rule may sometimes bar trial judges who have no actual bias and who would do their very best to weigh the scales of justice.' *Marshall v. Jerrico, Inc.*, 100 S.Ct. 1610, 1613 (1980)."
[page 5]

" Because the defendants in 01-139 are in default, I shouldn't have to make any arguments regarding res judicata... Nothing contained herein should be construed as a waiver of any objections I have, nor should it be construed as an intention to litigate issues by implied consent.

(3)Was the plea of res judicata properly pled and argued?

Before I address this issue, let me state that the decision in 98-cvs-139, which the defendants rely upon for res judicata, is void. Nothing contained herein should be construed as a waiver of my claim that 98-cvs-139 is void...if I am required to make further arguments regarding res judicata, I will."
[pages 6-7]

" I believe the fact that no N.C. case law was cited, or applied, should defeat the plea of res judicata, however, if I am required to continue, over my objections, I will.

(5) Is the plea of res judicata available on a motion to dismiss ?

It should be note that under N.C. law, res judicata is not available on a motion to dismiss.

'Properly raised, issue of res judicata is... ..not available on a motion to dismiss.' *Reid v. Holden*, 242 N.C. 408, 88 SE 2d 125 at 125 (N.C. 1955).

'Res judicata is an affirmative plea..which must be supported by competent evidence..the defense is not available on a motion to dismiss.' *Sanderson v. Aetna Life Insurance Co.*, 218 N.C. 270, 10 SE 2d 802, 803[2] (N.C.1940)...

...the burden of proof under N.C. law is upon the person asserting the defense of res judicata..The defendants presented no evidence whatsoever as to what issues were raised and actually determined in 98-cvs-139." [pages 8-9]

" Whether an issue.. was actually litigated and determined must be determined by a review of the entire record, *Reid v. Holden*, 242 N.C. 408, 88 SE 2d 125 (1955).' *Thomas v. Mc Innis & Associates*, 349 SE 2d 552 at 563 (1986)...

' A plea of res judicata cannot be determined on pleadings alone but only after evidence has been presented.' *Beam v. Almond*, 271 N.C. 509, 157 SE 2d 215 at 216[4] (1967).

The defendants never presented any evidence whatsoever with regards to 98-cvs-139; no briefs opinions, etc. to base a plea of res judicata upon....Therefore, it is my contention that it was incumbent upon the defendants' counsel to not only properly
assert the facts, but to provide a complete copy of the record of 98-cvs-139..I believe that it is too late for the defendants' counsel to do so now." [page 10]

" ..res judicata precludes subsequent action between the same parties or their privies *based on the same claim.' Hales v. N.C. Insurance Guaranty Ass'n.*, 445 SE 2d 590, 591[3] (1994)...
... 'The language therefore, which is so often used, that a judgment estops not only every ground for recovery ..actually presented..but also as to every ground which might have been presented.. When applied to the demand or claim in controversy..But where the second action between the same parties is upon a different claim in controversy, or demand the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding of the verdict was rendered.. Therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action, the inquiry must always be as

to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined.' *J.T. Mc Teer Clothing Co. v. Hay*, 163 N.C. 495, 79 SE 955 at 957 (1913)." [page 11]

" For judgment to constitute res judicata in subsequent action, there must be identity of parties, the subject matter..relief demanded also the identical question must have been considered and determined.' *Shaw v.Eaves*, 262 N.C.656, 138 SE 2d 520, 521." [page 12]

" It has already been shown that Judge Thornburgh, and R. Crawford, counsel for the defense, completely and intentionally ignored the N.C. law of res judicata." [page 17]

" Does the decision in 98cvs139 prevent relief in 01-139 through res judicata ? For the numerous reasons stated previously, I do not believe that I should be required to answer that question in order to prevail. The defendants filed no response in 01-139, nor did they file a timely, or legally sufficient, motion for an extension of time to answer..However, if the Court should require me to respond to the arguments brought forth by Judge Thornburgh, I will." [page 17]

" The ground for privity is property, not

personal relation..[it] rests on some actual mutual or successive relationship to the same right of property.' *Masters v.Dunstan*, 256 N.C. 520, 124 SE 2d 574, 577 (N.C.1962)... ... ' North Carolina Supreme Court would decline to adopt doctrine of 'virtual representation' ..doctrine was difficult to apply and doctrine amounted to abandonment of traditional concepts of res judicata, collateral estoppel and privity.' *Hale v. Natl. Ins. Guaranty Assoc.*, 445 SE 2d 590, 591 (N.C. 1994). " [page 18]

" My complaint in 01-139 is for the fraud of the defendant NCDOT engineers. They perpetrated a fraud on me, and the courts, they blocked my access to the courts, an important right under U.S.C.A. I (*See*: *Ryland v. Shapiro*, 708 F. 2d 967 (5th Cir.1983)." [page 25]

" The decision in 98-cvs-139 is void for numerous reasons. I asserted in my papers before the District Court that I did not have a full and fair opportunity to litigate my claims in the state courts." [page 27]

"[NCDOT attorney] Malonee flatly stated that my cause of action for the taking of my property had accrued..without explaining why he and the NCDOT engineers had denied it for

so long." [page 29]

" I was not given an opportunity by the District Court [Asheville Div.] to make a full exposition of the complete lack of due process of law in 98-cvs-139." [page 29]

" Another reason that 98-cvs-139 is void under N.C. law is the fact that the noteholders and trustees were not enjoined..

' In an inverse condemnation action, the trustees and holder of a note on the real property in question were necessary parties united with interest with the owners..' *North Carolina Civil Procedure*, 2d Ed, G. Gray Wilson, Volume I, Section 19-3, page 379

' Since persons united interest are necessary parties, a judgment that determines a claim before proper efforts have been made to enjoin one who is united in interest is void.' Ibid, Section 19-2.....

' When absence of necessary parties is disclosed, trial court should refuse to deal with the merits until the necessary party is brought in.' *White v. Pate*, 304 SE 2d 199 at 199[3] (N.C. 1983).

See also: Strong's 111 N.C. Index 4th, Section 297, page 544. For these reasons, and many others, the decision in 98-cvs-139 is void and subject to collateral attack. *See: Thompson v. Whitman,* 85 U.S. 457 (1873); *Hovey v. Elliot,*

167 U.S. 409, 17 S.Ct. 841 (1897); *Eliot et al. v. Piersol et al.,* 1 Peters (26 U.S.) 328 (1828). Thompson has been relied upon at least once in recent N.C. decisions." [page 30]

I, Christopher Langdon, solemnly affirm under oath that everything contained herein is true and correct, except those matters that are asserted under information and belief, and those matters I believe to be true.

Christopher Langdon "s/_____."
1835 Edwin Blvd., Winter Park, Fla. 32789
407-647-7539
I hereby also certify that a copy of these briefs has been mailed to: R. Crawford, 1505 Mail Service Center, Raleigh, N.C. 27699-1505.
Suscribed to and sworn before me, this the 1st day of October, 2001, by Christopher Langdon- FLDL # L523-104-51-385 -0.

Notary Public " s/_____".
Yvonne I. Bhikha
My Commision # CC 804494
EXPIRES : May 24, 2003
Bonded Thru Notary Public Underwriters

Exhibit # 9

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT
01-1975
(FORMERLY 01-107, 0-139)
FILED
NOV 15 2001
U.S. Court of Appeals
Fourth Circuit

CHRISTOPHER LANGDON,
Plaintiff-Appellant,
versus (01-107)
J.J. SWAIN,
JACK MURDOCK,
F.D. MARTIN,
Defendants-Appellees

CHRISTOPHER LANGDON,
Plaintiff-Appellant,
versus (01-139)
LYNDO TIPPETT,
ROY COOPER,
THE N.C DEPT. OF JUSTICE,
THE STATE OF NORTH CAROLINA

MOTION FOR SANCTIONS
[EDITED]

Nothing contained herein should be

construed.. as a waiver to my objections to the extension of time granted to the defendant-appellees by the District Court, or any other objections I have raised. Furthermore, nothing contained herein should be construed as an intent to litigate any issues by implied consent....
.....In his ..brief the counsel for the defen dants-appellees stated:
'NCDOT and its employees have consistently denied any responsibility for the landslide or landslides, and have denied causing Plaintiff any other harm.' pages 7-8, 'Appellees Brief.'... any statements or inferences that the NCDOT has consistently denied responsibility for the slides on my property are false...." [pages 2-3]

" T.L. Malonee, counsel for the NCDOT, stated.. *'the Plaintiff-Appellant's cause of action accrued...'* Of course, if the NCDOT, its engineers, or its various attorneys, had admitted earlier that my cause of action had accrued, I would have immediately filed a complaint. [page 4]

" It is obvious that, despite Crawford's denials, the NCDOT has admitted that they have taken my property without just compensation." [page 5]

" The assertion by T.L. Malonee, counsel

for the NCDOT..is a plain, unequivocal, unqualified admission that my cause of action for a taking..had accrued. It renders all the denials of responsibility [by] the NCDOT and its engineers, and its attorneys false and fraudulent." [page 7]

" In 00-cvs-206. I alleged that: Swain, Murdock and Martin failed to corrective measures and prevent the taking of my property, that they covered up NCDOT liability; that they intentionally prevented me from obtaining just compensation for the taking of my property...The defendants in 00-cvs-206 pled a statute of limitations in that case...It was not pled in the alternative. Therefore, the defendants in 00-cvs-206, including J.J. Swain, Jack Murdock and F.D. Martin..judicially admitted liability...I did take a voluntary dismissal without prejudice in 00-cvs-206. The defendants had filed..motions. I also filed motions that were supposed to be heard on the same day, including a motion to enjoin the noteholders and trustees, necessary parties, as required by N.C. law. However, the defendant's motions were placed on the trial court calendar and my motions were not.

I had similar problems in 98-cvs-139...I.. filed motions to compel discovery, pending appeal The trial court administrator refused to

place the motions on the calendar. The same person refused to place my motions on the calendar in 00-cvs-206. I tried to get a continuance but was unable to get the cooperation of [their] attorney, W. Richard Moore, who refused to return my telephone calls and the judge would not grant a continuance ex-parte, although I was in Florida at the time. ." [pages 11-13]

" Because I felt that I had exhausted the state remedies and because of the unfairness of those procedures. I filed suit in the W.D.N.C. against Swain, Murdock and Martin (01-139). I alleged similar, more detailed allegations against them in the federal case. In his.. brief in this matter..R. Crawford abandoned the plea of limitation...Therefore, the Plaintiff respectfully requests the following relief: (a) A declaratory judgment stating that : (1) Robert Crawford has violated Rule 11 of the Federal rules of Civil Procedure because of his denial of liability by the defendants... (2) That the defendants Murdock, swain and Martin..have judicially admitted their liability as outlined in 0-139 (now 01-1975); That the defendants Swain, Martina and Murdock have abandoned any plea of a statute of limitations.." [page 15]..Any further relief that the Court may deem just. Respectfully.

I solemnly affirm that everything herein is true and correct.

Christopher Langdon,
Plaintiff-Appellant "s/_____".
1835 Edwin Blvd., Winter Park, Fla. 32789-
407-647-7539—I hereby certify that I have mailed a copy of this complaint to: Robert Crawford, 1505 Mail service Center, Raleigh,N.C. 27699-1505.

Sworn to and suscribed before me this the 14th day of November, 2001.

Notary public "s/_____".
L. Frank Fussell
11/14/01
My Commission CC992164
Expires February 16, 2005
CC # 992164

[Exhibit #10]
UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT
FILED
NOV 28 2001
U.S. Court of Appeals
Fourth Circuit

CHRISTOPHER LANGDON,
Plaintiff-Appellant
versus (01-107)
LYNDO TIPPETT, [et al]
Defendants-Appellees

CHRISTOPHER LANGDON,
Plaintiff-Appellant
versus (01-139)
J.J. SWAIN [et al.].
Defendants-Appellees

SECOND MOTION FOR SANCTIONS

[EDITED]

" R. Crawford has never produced a single casein which a non-prisoner's, non-in forma pauperis complaint has been dismissed under 28 U.S.C. S. 1915. Robert Crawford is asking the Forth Circuit to do what no other court in the United States has ever done. However, Crawford never provides any supporting case

law, nor does he provide any arguments for changing the law. Therefore his request for dismissal of my complaints under 28 U.S.C.S. 1915 is in violation of Rule 11." [page 2]

" it is not my intention to argue the unsupported allegations of res judicata." [page 2]

" I contacted a former NCDOT employee and several private engineers and, basically, they told me the same things: that the problem would get worse and that eventually other slides would occur, if preventative measures were not taken. They noted two causes for the problems: the steepness of the NCDOT's bank and the NCDOT's drainpipe that was placed uphill from the NDOT's improperly sloped bank. The NCDOT... suggested that I undertake construction activity within the NCDOT's right of way to correct the problem, which I refused to do..The leis and concealment by the NCDOT engineers, Swain, Murdock and Martin caused me to delay filing a complaint against the NCDOT for the taking of my property. [3-4]

" I decided to see if the NCDOT was withholding the construction records from me alone, or, from all citizens. I asked a friend of mine to view and get copies of the construction

records [of NCSR 1116, which transverses my property]. She went to the NCDOT's district office in Horseshoe, N.C., where the records are usually kept, and asked Swain's successor, district engineer Ed Green, if she could have copies of the road construction records.

Green stated that it wasn't problem and took her to where the records were located... he discovered that the records were gone and then he remembered that the records had been removed to [N.C. Dept. of Justice/N.C.D.O.T. attorney] Malonee's office in Asheville, N.C. ...In the meantime I complained to the senior judge of the district, Judge Guice, about the Trial Court Administrator, Jerry Brewer, who was blocking my motions to compel [depositions from Swain, Murdock, Martin et al.] ..From what Brewer said to me, it was my understanding that Malonee, the NCDOT's attorney ..had urged him not to place the motions on the calendar." [page 6]

" I had first asked Swain if I could see the construction records in early August, 95. More than four years later, I received what was alleged to be some of the records." [page 8]

" ..R. Crawford stated that: 'It is further admitted that in May 1999, the records were in possession of ..Malonee who was reviewing

them for purposes of defending the litigation brought by Plaintiff [Christopher Langdon]... and appeal of that litigation.'

No explanation was given as to why Malonee had the original records removed to his office.. ..I was never told why Malonee wanted the original records, rather than copies. Of course, there are two possible explanations: (a) Malonee wanted to prevent me from viewing the records... (b) Malonee wanted to alter, or, destroy a portion of the records. Of course I have no proof that he did alter or destroy ..records, I am only stating that it is a possibility..He certainly wanted to prevent me from seeing the records. R. Crawford never cited any statute that would allow Malonee to take the records into his possession..he states 'it is admitted that ..Malonee is not the custodian of the requested records..'..

....the N.C. Public Record Law States :

' Every custodian of public record shall permit any record in the custodians custody to be inspected and examined at reasonable times and under reasonable supervision by any person..' N.C.G.S. 132-6(a). As long as Malonee had the records, they couldn't be inspected by me, or anyone else." [page 9-10]

" I also stated that I hadn't received certification of the records...Crawford

responded in a letter as follows:

' The Public Records Act does not require that 'certified' copies be provided.' Letter of R. Crawford, dated October 7th, 1999.
[but see] ' Persons requesting copies of public records may request that the copies be certified.' N.C.G.S. 132-6.2(b).

It is obvious that R. Crawford intentionally misrepresented the law in order to get me to drop my complaint." [page 11]

" I was denied access to the public records, by Swain, as early as August 95. I was denied access to the records when they were removed to Malonee's office in 1998. I was denied access to the records when Judy Cook went to the district engineer's office in 1999 and attempted to get copies of the records on my behalf." [page 12]

" It is also obvious that the claim of frivolousness was made up to prevent a full and fair hearing on my claims and to greatly increase the time and cost of this litigation." R. Crawford stated in his brief before the Court, on page 9, that the defendants have acted in good faith. The events described herein prove that statement is false with regards to defendant Swain....

Therefore, the Plaintiff _Appellant respectfully requests the following relief:

(A) all cost of this appeal be paid by the defendant-appellees and/or their attorney.. any other relief that the court may deem just.

I, Christopher Langdon, solemnly affirm under oath that everything contained herein is true and correct, except those items asserted on information and belief, and those items I believe to be true.

Christopher Langdon,
Plaintiff-Appellant "s/_____".
1835 Edwin Blvd., Winter Park, Fla. 32789
407-647-7539

Signed and suscribed to before me this the 26th day of November, 2001.
Notary public "s/_____".
Samuel Martin
My Commission DD0262261
Expires May 15, 2005

I hereby certify that I have mailed a copy of the second motion for sanctions to: R. Crawford, 1505 Mail Service Center, Raleigh, N.C. 27699-1505, this the 27th day of November, 2001.

I hereby certify that I contacted R. Crawford regarding this motion via fax and asked him if he wished to discuss it. He did not respond.

Christopher Langdon "s/_____".

(5) Supreme Court, U.S.
FILED
02 12 JUL 1 2002

No.

In The

Supreme Court of the United States

Christopher Langdon, Petitioner,

v.

Lyndo Tippett, Roy Cooper et al.

consolidated with:

Christopher Langdon, Petititoner,

v.

J.J. Swain, Jack Murdock, F.D. Martin et al.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Fourth Circuit

APPENDIX, PART IV, FOR PETITION FOR WRIT OF CERTIORARI

Christopher Langdon
Pro Se
1835 Edwin Blvd.
Winter Park, Fla. 32789
407-647-7539

35pg

{Exhibit #11}

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT
CASE NO:01-1975
FILED
FEB 12 2002
U.S. Court of Appeals
Fourth Circuit

CHRISTOPHER LANGDON,
Plaintiff-Appellant,
versus (Formerly 01-107,
LYNDO TIPPETT, W.D.N.C)
ROY COOPER,[et al.]
Defendants-Appellees

CHRISTOPHER LANGDON,
Plaintiff,
versus (Formerly 01-139,
J.J. SWAIN, [et al.] W.D.N.C)
Defendant-Appellees

THIRD MOTION FOR SANCTIONS

EDITED

(1) When I filed the first two motions for sanctions, I was not aware of the inherent power of courts to impose sanctions, regardless of the rules. *See Chambers v. Nasco, Inc.,*

501 U.S. 32, 115 L. Ed 2d 27, 111 S.Ct. 2123 (1991).

(2) Under its inherent powers, a court may enter a default judgment against a a defendant as a sanction.

" Courts may impose a variety of sanctions under their inherent power, including the following: .... Entering default judgment against the offending party..Disqualifying or suspending counsel..Drawing adverse evidentiary inferences or precluding admission of evidence." *Moore's Federal Practice*, 3rd Edition, Volume 2, Section 11.41[5], pages 11-76, 11-77 (2001).

I believe that a default judgment should be entered against defendants Swain Murdock and Martin because of their conduct and the conduct of their attorneys.

(3) It has been pointed out in the plaintiff's affidavit regarding sanctions, which has been incorporated herein by reference, that the assertions of a movant that aren't denied, are deemed admitted.

" ...we must accept as true the movant's undenied allegations. *Lonsdorf v. Seefeldt*, 47 F. 3d 893, 897 (7th Cir.1995)." *Tobel v. City of Hammond*, 94 F. 3d 360 at 362[4] (7th Cir.1996).

The defendants never responded to the

plaintiff's first and second motions for sanctions, therefore, the assertions contained therein should be deemed admitted.

(4) The Plaintiff's "Second Motion for Sanctions" and "Motion for Sanctions" are incorporated herein by reference.

(5) In the plaintiff's motions for sanctions relief was requested under Rule 11. It has since come to the plaintiff's attention that Rule 11 is not applicable to cases under appeal. However, sanctions are available under the inherent powers of the court and under 28 USC, Section 1927. The relief of a default judgment is available under the inherent power of the courts.

(6) It has been judicially admitted by the defendants, Swain, Murdock and Martin, that they have prevented all meaningful discovery in this matter for over 6 & ½ years. The defendants have admitted, by not responding to the plaintiff's "First Motion for Sanctions," that they have judicially admitted responsibility for the taking of the plaintiff's 6.83 acres. They have also admitted that the assertion in the "Appellees' Brief," that the defendants have consistently denied responsibility for the taking of the plaintiff's property, is false.

(7) The defendants have not presented a viable defense. Even if they had, when there is unreasonable delay by a defendant, the courts may enter a default judgment. In *Link v. Wabash Railroad Co.*, 370 U.S. 626, 82S.Ct. 1386, the U.S. Supreme Court upheld the dismissal of Link's complaint by a District Court in Indiana. The case had been filed 6 years prior to the dismissal and the plaintiff's attorney had not prosecuted the case. There was no discussion as to the merits of the case and there was no proof that Link was responsible for the delay.

In the present case there are more reasons to impose a serious sanction than in *Link* because there is evidence that the defendants, and their attorneys, are both responsible for the delays. These delays in this matter have gone on for

over 6 years and 7months. Unlike Mr. Link, defendants Swain, Murdock and Martin are not blameless for the delays in the present case.

(8) Because the defendants, and their attorneys, have admitted that Swain blocked access to the construction records, the court may assume that the records were evidence of the culpability of defendants Swain, Murdock and Martin. The court may also utilize the sanction of default against the defendants for their delays, concealment and fraud.

" G.N.C.'s conduct creates a presumption that the missing data would have permitted Thompson to prove the ..claims that lie at the heart of its complaints." *W.M. Thompson Co. v. General Nutrition Corp.*, 593 F. Supp. 1443 (C.D. Calif. 1984).

" Imposition of severe sanctions is required in this case by the severity of the abuses that took place. The record shows that GNC deliberately and purposefully undertook a program to impede and obstruct the litigation process, presumably because it believed that the case would be lost if all the evidence ever came to light. Imposition of a lesser sanction [than default] would only reward GNC for misconduct in this litigation." Ibid at 1456.

" Litigant must preserve, and must not alter, documents it knows or reasonably

should know are relevant to imminent litigation.." *Brady v. U.S.*, 877 F. Supp. 444, at 445 (C.D.Ill. 1994)

" Because defendant had prompt notice it 'could have maintained its records and taken testimony of key employees in anticipation of ensuing litigation.' *Howard v. Roadway Express*, 726 F. 2d 1529, 1533 (11th Cir.1984)." *E.E.O.C. v. Jacksonville Shipyards, Inc.*, 690 F. Supp. 995 at 1000-1001 (M.D.Fla.1988).

" Rule authorizing court to impose sanctions for discovery abuse does not apply to alleged destruction of documents which takes place before action is filed and discovery begins; however, such conduct can be sanctioned through the court's inherent powers." *ABC Home Health Services v. I.B.M. Corp.*, 158 F.R.D. 180 at 180[2] (S.D.Ga.1994).

(9) There are additional reasons for sanctioning the defendants by entering a default against them. The defendants have mischaracterized my complaint as being one for inverse condemnation only, which is a sanctionable offense in itself. I am seeking just compensation for the taking of my property. However, I am also seeking compensation for the denial of my rights to notice and opportunity to be heard before the taking of my property, the right to equal protection under the law, due process of law, the right to

petition the government for a redress of grievances, the right of access to the courts and the right to earn a living.

" The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.." *Satterfield v. Edenton-Chowan Bd. of Education*, 530 F. 2d 567, 572 (4th Cir.1975)

" Due process of law means notice and hearing, and in that order. *Gunter v. Town of Sanford*, 186 NC 452, 120 Se 41. It is a minimum content by which a person may be deprived of his life, liberty or property." *Bowie v. Town of WestJefferson*, 57 Se 2d 369, 371[1] (N.C.S.Ct.1950)

" It is a principle never to be lost sight of that no person should be deprived of his property or rights without notice and opportunity of defending them." *Hamilton v. Adams*, 6 NC 161.

Belated notice of the taking of the plaintiff's property is not constitutionally sufficient.

(10) As stated, the plaintiff believes the misrepresentation of the plaintiff's complaint as merely an action for inverse condemnation is an intentional attempt to minimize the plaintiff's claims, and is sanctionable.

" Right to petition the government for a

redress of grievances is cut from the same cloth as the other guarantees of the First Amendment, and is an assurance of a particular freedom of expression." *McDonald v. Smith*, 472 U.S. 479, 86 L. Ed 2d 384, 105 S.Ct. 2787 (1985).

" Right of access to the courts, a fundamental right guaranteed by the United States Constitution, has several constitutional bases, including the First and Fourteenth Amendments, as well as the due process clause ..If motorist's allegations of a thwarted police investigation of collision between motorist and police officer and coverup of the police officer's intoxication were true, the interference with and potential prejudice to his right of access to redress in the state courts rose to the level of a constitutional deprivation of right of access to the courts." *Fisher v. City of Cincinnati*, 753 F.Supp. 681 at 682[3-4] (S.D.Ohio1990).

" Allegations that plaintiff's ability to commence wrongful death action was precluded by conduct of local officials in the destroying evidence and failing to conduct appropriate investigation into individuals death stated viable claim under Section 1983. U.S.C.A. Const. Art.4, Sections 1 et seq., 2, cl. 1; Amends 1,5, 14." *Stump v. Gates*, 777 F. Supp. 808, 809[6] (D.Colo. 1991).

" There is no requirement of specific intent

in actions under 1871 civil rights statute, and if defendants did not intend to harm plaintiff by their actions, liability was not for such reason precluded..Defendants could be liable for alleged actions prejudicial to plaintiff's chances of recovery in state court in view of fact that resulting delay would cause stale evidence and fading of material facts in minds of potential witnesses, and that it could prove more expensive to litigate such action..Any interference with substantive constitutional right, such as right of access to the courts, may alone amount to constitutional deprivation.." *Ryland v.Shapiro*, 708 F. 2d 967, 968 [12-14] (5th Cir.1983)

The entering of a default judgment is the only fair sanction to properly vindicate the plaintiff's right of access to the courts. The U.S. Supreme Court has repeatedly held that access must be meaningful and at a meaningful time and is extended to prisoners. *See: Bounds v. Smith*, 430 U.S. 817, 97 S.Ct. 1491 at 1495 (1977). Certainly, the right should

not be denied to law-abiding, tax-paying citizens as well. The defendants' de-lays, past and present, have denied the plain-tiff-appellant meaningful access to the courts at a meaningful time.

(11) The defendants filed three motions for an extension of time to file a response in 01-139 (W.D.N.C.) (now 01-1975). The defendants' attorney failed to discuss the motions with the plaintiff before filing them, in violation of Rule 7.1(A) of the *Rules of Practice and Procedure of the United States District Court for the Western District of North Carolina* (Exhibit 1). Violation of the local rules is a sanctionable offense.

(12) The defendants' attorneys referred to a landslide or landslides on the plaintiffs property in their brief. The references are as follows:

(a) " On or about June 1995, a landslide or landslides occurred on property owned by Plaintiff which abutted North Carolina Secondary Road 1116." page 4of "Appellee's Brief," Exhibit 2

(b) " ..landslide or landslides.." Ibid, page 5, lines 1 and 2, page 8, line 1.

(c) " The landslide or landslides that precipitated the instant case took place in 1995." Ibid, page 16, lines 7-8.

(13) The preceding statements from the defendants' brief are false and a misrepresentation of a material fact. The damage to the plaintiff-appellant's property did not occur during a single landslide, but over a long period of time during many numerous, small slides. That is what the plaintiff-appellant has always alleged.. The attorneys for the defendants have never submitted any affidavits to the contrary.."

(14) The defendants' attorneys in the present case contradicted themselves by referring to the damage occurring during a landslide or landslides. It has to be one, or the other, because both scenarios can't be true. This is similar to a fraud perpetrated on the court in 98-cvs-139, Polk County, by T.L. Malonee, the same NCDOT attorney that had the construction records for the road that goes through the plaintiff-appellants property removed to his office in Asheville, N.C., contrary to the public records law.

(15) Let me interject that it is not my intention to re-litigate 98-cvs-139 herein, nor is it my intention to litigate by implied consent any issues that have been deemed admitted by the defendants, nor is it my intention to waive any objections that I have made regarding the failure of the defendants to file an answer in 01-139 (W.D.N.C.).

...(19) ...Malonee deceived the court into the believing that the damage to the plaintiff's property occurred on a single date and that there was an applicable statute of limitations from that date. I am not r-arguing that case, I am trying to show the Court why Malone deceived a previous court and to show how that relates to some of the deceit by the defendants' attorneys in the present case.

....(24) Because the defendants have not supplied any affidavits in support of their 'Appellee's Brief,' one can assume that the brief was filed for dilatory purposes and, therefore is sanctionable.. Summary: The imposition of sanctions against the defendants and their attorneys is appropriate for the following reasons: (A) The defendants' attorney, R. Crawford did not consult with the plaintiff-appellant before filing any of the three motions for an extension of time before filing them, contrary to the local rules. (B) The defendant-appellees' attorneys misrepresented the number of slides on the plaintiff's property whenever they referred to a landslide, rather than landslides. (C) It may be assumed that the construction records in question were spoiled while under the control of NCDOT attorney Malonee (D) The failure of the NCDOT's attorney to submit any affidavits to suport its motions for an extension of time, or, to support its 'Appellee's Brief.' It can be assumed that the 'Appellees' Brief was file for dilatory purposes. (E) When taking the offenses cited herein, along with the un-denied allegations in the first two motions for

sanctions, it is clear that the sanctions of a default judgment, along with costs, are the only adequate sanctions....

I solemnly affirm that everything contained herein is true and correct, except those matters asserted under information and belief, and those matters I believe to be correct.

Christopher Langdon, Plaintiff "s/_____".

Suscribed to and sworn before me, this the 9th day of February, 2002.

Notary Public "s/_____".
Permanand Bhikha
My commission DD009669
Expires March 15, 2005

The plaintiff-appellant certifies that a copy of this third motion for sanctions was mailed to: Robert Crawford and Lisa Glover, 1505 Mail Service Center, Raleigh, N.C. 27699-1506, this the 9th day of February, 2002. Furthermore, the plaintiff- appellant certifies that he faxed a copy of said attorneys to inform them that he was going to file motions for sanctions and that they could contact him if they wished to discuss them. They did not do so.

Christopher Langdon,
Plaintiff-Appellant "S/_____".
1835 Edwin Blvd., Winter Park, Fl. 32789-------
407-647-7539

{EXHIBIT # 12}

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
CASE NO: 01-1975
FILED FEB 25 2002
U.S. Court of Appeals Fourth Circuit

CHRISTOPHER LANGDON,
PLAINTIFF-APPELLANT,
versus
J.J. SWAIN,
JACK MURDOCK,
F.D. MARTIN,
DEFENDANT-APPELLEES

CHRISTOPHER LANGDON,
PLAINTIFF-APPELLANT,
versus
LYNDO TIPPETT, ROY COOPER,
ET ALIA,
DEFENDANT-APPELLEES

PLAINTIFF-APPELLANT'S FOURTH MOTION FOR SANCTIONS

(1) The plaintiff-appellant believes that the sanctions of a default judgment and double costs should be entered against defendants Swain, Martin and Murdock for the following reasons:

(2) In their "Appellees' Brief" the defendants' attorneys stated: "NCDOT and its employees have consistently denied any responsibility for the landlside or landslides..." (Pages 7-8). That statement is false and the defendants' attorneys know that it is false. The false statement is intended to deceive the Honorable Court of Appeals in order to cloak the defendants with a false aura of integrity.

(3) The plaintiff-appellant has already shown that the statement is false in the plaintiff-appellant's first motion for sanctions. It is not the plaintiff's intention to relitigate those assertions which have not been denied. It is the intention of this paper to show that when the defendants Swain, Murdock and Martin denied responsibility for the landslides, they did not do so consistently and that they have acted in bad-faith, contrary to their attorneys' assertion in their brief.

(4) Nothing contained herein is a waiver of any objections that the plaintiff-appellant has to the timeliness of the defendants' motions for an extension of time, their failure to file an answer in 01-139, W.D.N.C., and the possibility that their brief may have not been timely filed.

(5) After the initial micro-slide of approximately 15 sq. ft. within the NCDOT's right of way, I spoke to defendant Swain, the NCDOT District Engineer at the time. He looked at the property on his own, refusing to view it with me. I met with him afterwards and he urged me to correct the problem on my own, including doing work within the NCDOT's right of way. At no point in his letter (Exhibit 1) did he state what he believed was the cause, or causes, for the situation.

(6) I then wrote defendant Murdock about the situation. At the time, Murdock was the NCDOT engineer in charge of all the secondary roads in N.C. I also wrote a small, local newspaper asking that anyone who was concerned about the situation write to Murdock. Murdock responded by suggesting that I was responsible for the situation (Exhibit 2). As bizarre as it may seem, Murdock's basis for the accusation was a letter he received from a nearby resident that blamed me. It is my understanding that it was a woman who had a personal vendetta against me. She is not an engineer.

(7) In his letter of July 17th, 1995, NCDOT engineer Ledbetter cited the steepness of the terrain and heavy rainfall as the most likely causes. He also falsely stated that I had clear

cut the property.

(8) In a letter dated July 20th, 1995, NCDOT engineer D.R. "Dave" Henderson stated that: "The extremely wet conditions experienced within the past 24 months would be the most likely cause for the instability of the previously stabile slope." In his letter, Henderson also denied NCDOT responsibility. Copies of this letter were supplied to me by Murdock and Swain.

In his letter, Henderson recommended that I move the NCDOT's drainpipe. In his accompanying letter (Exhibit 1), Swain stated that:

"..any activity that you plan within the right of way..must be approved by this office..This would include your connecting onto our existing drainage pipe to redirect the water ***as suggested in Mr. Henderson's report."*** I took that to mean that Swain was endorsing Henderson's assertion that the situation was caused by the "extremely wet

conditions." I assume that he was endorsing that viewpoint because he sent me Henderson's letter.

(9) In a letter (report) dated simply "July 1995," NCDOT engineer F.R. Glass stated: " As I understand it, no problems on this roadway were apparent until clearing operations on this property were started.

(10) In a report dated August 16th, 1995, F.D. Martin, a defendant in the present case, stated that :

" I can't really say that the clearing of the trees actually triggered the slide..***I think that the slide would have occurred without the clearing*** or the presence of the pipe." Exhibit 3, page 2.

(11) In a report dated February 20th, 1996, F.D. Martin stated that:

" I have once more reviewed this situation with our District Engineer, Mr. J.J. Swain, Jr., P.E. and ***it is still the opinion*** of this department that the movement of the earth mass in this area has probably been caused simply due to the geologic formations and instability of the area." Exhibit 4.

How could it still be the opinion of defendant Swain, defendant Martin, and

the NCDOT that the slides were caused by "geologic formations" when they, nor any other NCDOT engineer, had ever put forth that notion previously ? I have cited six reports by NCDOT engineers, including one by Martin and one by Swain, and none of those reports made any reference to "geologic formations" as a cause of the situation.

(12) On March 7th, 1996, an article on the situation ran in the local newspaper, *The Tryon Daily Bulletin.* In that article, Dennis Allen, the NCDOT maintenance engineer for Polk County, N.C., the county the property is located in, was quoted as saying that: " We're just saying that, really, as far as what's causing the problem, it could have been the tree cutting." The article also quoted Glass's report that indicated that I was responsible for the situation.

The article also quoted NCDOT engineer Allen, a subordinate of Swain's, that I was mismanaging other property that I had built on. I contacted NCDOT engineer Allen and asked if he was correctly quoted. He replied "yes" and I then asked him what he was referring to when he said that I was mis-managing property that I was building on. I was not building on any property at the time.It turns out that he mistook someone else's

property as mine. I explained to him how NCDOT engineer Martin had stated in one of his reports that the clearing of a few trees was not the cause of the situation and I asked him to write a retraction. He refused to do so. I then wrote to Swain and Murdock asking them to retract the comments made by their subordinates and I received no response.

It should be noted that, according to my information, the woman referred to in Murdock's letter(Exhibit 2), the one that claimed that I was responsible for the situation, was also the person that went to the *Tryon Daily Bulletin* and got them to write the libelous article containing the libelous comments of the NCDOT engineers.

The article destroyed my reputation and my real estate business in Polk County, N.C. People began calling me and harassing me. People were accosting me in stores, on the streets and in other public places demanding that I correct the problem before it got worse. My "for sale" signs were being torn down faster than I could put them back up. I advised my clients that I could not represent them. Almost all of my real estate projects had been privately financed. I could no longer get financing. I had trouble paying my debts. One creditor threatened me

with a pistol.

I then worked doing home repairs and moved to the eastern part of N.C. in 1998, and to Florida in 1999. I have not made any money in real estate since these problems began.

If Murdock had told the woman in question the truth, that I wasn't responsible for the situation, it would have helped alleviate my problems. A public retraction would have also helped.

(13) Martin wrote a third report on the situation, dated 29 March 1996. In that report he stated:

" Early on when this problem began to surface, some comments were made by parties other than the Department of Transportation that perhaps the slide might have been caused by the removal of timber cover. This office has never made such statements and, as a matter of fact, in one of our earlier letters, we indicated that it is not our feeling that the clearing operations caused the slide, rather it is our feeling that the slide is simply caused by an unstable earth mass which has begun to move for some reason or other..we have not voiced an opinion as to what caused the slide...we are not blaming the property owner." Exhibit 5,

page 2.

You will note that there was no mention of a "geologic formation" in the letter. Please also not that Martin falsely states that no one in the Dept.of Transp. had indicated that the plaintiff-appellant was responsible for the situation. I have already shown herein that, previous to Martin's letter of March 29th, 1996, NCDOT engineers Murdock, Allen, Glass and Ledbetter had made statements blaming me and/or strongly inferring that I was responsible for the situation.

Swain also made comments strongly inferring that I was responsible for the situation because I had cut some trees. Defendant Swain was interviewed for an article on the situation that appeared in *The Hendersonville-News Times*. He was also interviewed for a tv news program on Channel 13, Asheville. In both interviews he strongly inferred that I was responsible for the situation.

(14) Let me again re-iterate that I am not trying to re-litigate the question of NCDOT responsibility by reciting their various denials. The question of liability has been settled by the plaintiff-appellant's first motion for sanctions, complaint in 01-139 and brief in 01-1975.

I am trying to show that the NCDOT engineers were not consistent when they denied responsibility, contrary to the "Appelees' Brief." I am also showing that they acted in bad faith, contrary to an assertion in the "Appellee's Brief." Although these events may have been alluded to in other papers, it is my understanding that a motion for sanctions must be separately filed.

(15) In a letter dated 7 July 1998, the N.C. Secretary of Transportation at the time, E. Norris Tolson, stated that the NCDOT geotechnical staff was "of the opinion" that the cause of the situation was "geologic formations."

(16) Only one set of interrogatories regarding these matters that was ever "answered" so far. In a response to interrogatory #3, 98-cvs-139, Polk County, Swain was asked if the NCDOT was contending that the slides were caused by a geological abnormality or because I cut a few trees on my property. In his notarized response, Swain would not give any reason for the slides. He stated: "The exact cause of the slide has not been determined by the NCDOT."

If the NCDOT wasn't sure what caused the slides, how could it have honestly accused

me of causing the slides, or, blamed the slides on a "geologic formation"? Obviously, they couldn't have.

(18) A chronology of the false and contradictory statements is as follows:

(a) In July of 1995 I met with defendant Swain, the NCDOT District Engineer at the time, and NCDOT engineer Allen. Swain suggested that I undertake construction work to correct the situation. Swain recommended that I build a retaining wall at the base of the property within the NCDOT's right of way; that I move the NCDOT's drainpipe, and that I regrade the property between the two, including property within the NCDOT's easement and beyond it. Swain never stated, an opinion as to the cause of the situation and neither did Allen.

(b) I asked Swain to put his recommendations in writing and he responded via his letter of 26 July 1995(Exhibit #1). Nowhere in his letter did he state, or infer, that the plaintiff-appellant was responsible for the situation. Nowhere in the letter did Swain suggest that the situation was caused by a "geologic formation." In his letter, Swain admitted that he had done no study of what he termed "your

problem." Without doing a study, he determined it was my problem.

(c) Attached to Swain's letter was a copy of a letter by NCDOT engineer Dave Henderson dated 20 July 95. In that letter, Henderson blamed the situation on "extremely wet conditions." He also recommended that I move the outlet of the NCDOT's drainpipe. In Swain's accompanying letter, Swain stated that I would have to get the NCDOT's permission before undertaking construction work within the NCDOT's right of way. Nowhere in the letter ("report") did Henderson attribute the situation to any tree removal or any "geologic formation."

(d) I complained to Jack Murdock, the NCDOT engineer in charge of secondary roads within the State of N.C. In his letter dated 2 August 1995, Murdock suggested that I was responsible for the situation because I had cut a few trees for a building site. He forwarded this opinion at the suggestion of a neighbor who is not an engineer, and despite the fact that neither Swain, nor Henderson, put forth that opinion in either of their "reports." Murdock did not mention any "geologic formation" in his letter (Exhibit 2) and hadn't visited the site.

(e) In a letter dated 17 July 95, NCDOT engineer Ledbetter cited the steepness of the terrain and rainfall as the causes. He also falsely stated that I had clear cut the property. Ledbetter failed to mention that the steepness of the NCDOT's bank is the responsibility of the NCDOT. Ledbetter never mentioned any "geologic formation."

(f) F.D. Martin wrote three letters ("reports") on the situation. In his first letter dated 16 August 1995, on page 2, (Exhibit-3) Martin stated that he thought that the clearing was not the cause of the slides. Martin did not mention that a "geologic" formation was the cause of the situation. He ventured no cause for the situation.

In his second letter, dated 20 February 1996 (Exhibit 4), Martin states the cause is a geologic formation,"after reviewing the situation with Swain In his third letter dated 29 March 96 (Exhibit 5), Martin doesn't mention a "geologic

formation." He did state that the bank has begun to move for "some reason or other." He also absolved the plaintiff-appellant of any responsibility and threatened to have the plaintiff-appellant charged with any cleanup cost, should any dirt move onto the paved section of NCSR 1116 ("Hogback Mt. Rd.). Martin also falsely stated in his last "report" that no one in the Dept. of Transp. had blamed the plaintiff-appellant for the situation and he gave the distinct, false impression that the "geologic formation" excuse has always been the NCDOT's officially designated cause for the situation.

(g) NCDOT engineer Allen made comments in the *Tryon Daily Bulletin* blaming the plaintiff-appellant for the situation and deriding the plaintiff for the management of property he didn't even own or have any control over. Swain also made comments to the media, print and television, that strongly inferred that the plaintiff-appellant was responsible for the slides. Swain, Allen and Murdock refused to apologize for the comments personally, or, on behalf of the NCDOT.

(h) The Secretary of Transportation stated in a letter dated 7 July 1998 that it was the opinion of the NCDOT's geotechnical department that the situation was

caused by " geologic formations and the instability of the steep slopes." Blaming the slides on unnamed "geologic formations" seems strange because that excuse had not been put forth by NCDOT engineers Swain, Murdock, Allen, Glass, Ledbetter, Henderson, or Elvey Thomas, all of whom , except Murdock, had allegedly viewed the property. The steepness of the NCDOT' bank, referred to as "steep slopes" in the Secretary of Transportation's letter, was a cause of the problem. The NCDOT has refused, and still refuses to accept responsibility for the steepness of the terrain within their right of way.
(i) On March 2nd, 1999, Swain signed a verified answer to an interrogatory in which he stated that: " The exact cause of the slide has not been determined by the NCDOT."

(19) As you can see, defendants Swain, Murdock and Martin have made numerous statements regarding the cause of the slides that contradict each other and, in some cases, themselves.

(20) It should also be noted that in the plaintiff-appellant's complaint against Murdock, Swain and Martin, which is incorporated herein by reference, the plaintiff stated on page 5, section 26, that in

a hearing before the North Carolina Industrial Commission, Deputy Commissioner Douglas E. Berger presiding, that "The attorney for the NCDOT, Michael Warren, stated during the hearing that any statements made by the NCDOT engineers stating and/or inferring that I was re-

sponsible for the slides on my property were false and that the engineers making those statements knew they were false when they made them."

The defendants' attorneys did not supply an affidavit from NCDOT attorney Warren to the contrary, nor did they supply any affidavits from any of the defendants denying that they had made false accusations against the plaintiff-appellant. I don't recall any denial in the "Appellee's Brief" that Warren had made such an admission. The un-denied statement in the plaintiff-appellant's verified complaint (01-139, W.D.N.C., now 01-1975) should be deemed admitted.

Furthermore, the plaintiff-appellant has filed a related complaint against the current Secretary of Transportation, Lyndo Tippett, for injunctive relief. In the verified complaint, case no: 5:01-cv-906-BO(3), the plaintiff-appellant stated on pages 5-6 that: " An NCDOT attorney, Michael Warren, admitted in a hearing before the North Carolina Industrial Commission, that the NCDOT engineers that blamed me for the problems of the NCDOT's bank knew that I wasn't responsible and they made the assertions anyway."

The assertion of the plaintiff-appellant went un-denied, and no affidavits were filed to the

contrary. As shown herein, defendants Swain and Murdock knowingly made false statements stating, or implying, that the plaintiff-appellant was responsible for the slides.

NCDOT attorney Warren also admitted that any statements by NCDOT engineers that asserted that I had clear cut my property, or, had cut most of the trees on my property were false and those making such statements knew they were false when they made them. In his first "report," Martin falsely stated that I had cut most of the trees on my property.

(21) In the plaintiff-appellant's verified complaint against Swain, Murdock and Martin (01-139, (WDNC), page 3-4, Section #16, the plaintiff-appellant stated:
"..the NCDOT came up with a new fraud. They began claiming that the micro-slides were caused by a geological formation."

The defendants never denied the plaintiff-appellant's assertion in the "Appellee's Brief" that I am aware of. None of the defendants supplied affidavits to the contrary.

In his order of dismissal, Judge Thornburgh relied, in part, on the "defense" that *he* believed that the NCDOT engineers had stated that there was no geological evidence to implicate the NCDOT and its engineers. In actuality, one NCDOT engineer, out of seven that viewed the situation, stated in one of his

three report that the situation was caused by a geologic formation.

In any case, it has been judicially admitted by the defendants that the baseless theory of a geologic formation was a fraud. Those same defendants and their attorneys are asking the Honorable Court of Appeals to ratify the dismissal of the plaintiff-appellant's case, despite the fact that it was based on a fraudulent "theory" that was promulgated by defendant Martin.

(22) On pages 4-5, Section # 21of the plaintiff-appellant's complaint in 01-cv-139, W.D.N.C., now 01-1975, the plaintiff-appellant stated that :

" I later learned by accident that there is a *Design Manual* published by the NCDOT. I was told by one of the authors of the manual, Mr. Shearin, that the NCDOT's bank on my property was not sloped according [to] the NCDOT's standards contained in the *Design Manual.*"

I do not recollect any denial of the preceding statement in the "Appellee's Brief," nor did any of the defendants supply any affidavits to counter the plaintiff-appellant's verified statement. Therefore, I ask that the statement be deemed admitted.

(23) There is plenty of evidence contained

herein to support a finding of bad faith and a default judgment as a sanction.

" Bad faith' may be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation.' *Hall v. Cole,* 412 U.S. 1, 15, 93 S.Ct. 1943, 1951, 36 L.Ed 2d 702 (1973). See *Browning v. Debenture Holders' Comm. v. DASA Corp.,* 560 F. 2d 1078, 1088 (CA2 1977)." *Roadway Express, Inc. v. Piper,* 447 U.S. 752, 65 L. Ed 2d 488, 100 S.Ct. 2455 at 2464[16] (1980).

" District Court's sanctioning insurer by entering default judgment..was proportionate to insurer's willful failure to comply with discovery orders and its record of contumacious conduct." *Crown Life Insurance Co. v. Craig,* 995 F. 2d 1376 at 1376[2] (7th Cir.1993).

(24) There other examples of bad faith on the part of the defendants. On page5, Section # 22, the verified complaint in 01-cv-139, W.D.N.C., now 01-1975, states:

"Swain, Murdock and Martin concealed from me the fact that the NCDOT's bank was not properly sloped according to the NCDOT's own standards."

There was no denial of that verified statement. In fact, there was no denial in the "Appellee's Brief" of any of the claims and assertions put forth in the Plaintiff-Appelant's complaint in 01-139, WDNC. The only denial was the denial cited herein that appears on pages 7-8 of the "Appellees' Brief." That denial states:

"NCDOT and its employees have consistently denied responsibility for the landslides, and have denied causing Plaintiff any other harm. The first part of that statement has been proven false in the un-denied assertions in the plaintiff's first motion for sanctions, and in this motion for sanctions. The entire statement is conclusional and not supported by any affidavits.

" Conclusional denials of conspiracy in affidavits obviously drafted by lawyers are entitled to little weight.." *Products Liability Insurance Agency v. Crum & Forster Insurance Companies*, 682 F. 2d 660 at

660[1] (7th Cir.1982).

The defendants made no denials in their brief of the numerous factual and legal assertions and claims in the plaintiff-appellant's complaint (01-139, WDNC, now 01-1975). Those assertions and claims were substantiated and include claims that the defendants, Swain, Martin and Murdock conspired to deprive me of my rights to: due process of law; equal protection under the law; notice and opportunity to be heard before taking a citizen's property; meaningful access to the courts; and numerous other claims and factual assertions. All of the factual assertions and claims contained in the plaintiff-appellant's complaint, 01-139, WDNC, should be deemed admitted.

(25) The sanction of a default judgment in the amount sought in the palintiff-appellant's motion for default judgment is the most appropriate remedy, especially when the facts herein are considered in the light of the facts contained in the other motions for sanctions and papers field by the plaintiff-appelant.

I, Christopher Langdon, solemnly affirm under oath that everything contained herein is true and correct, except those matters asserted on information and belief and those

matters I believe to be true and correct.

A copy of this document has been mailed to: Robert Crawford and Lisa Glover, 1505 Mail Service Center, Raleigh, NC 27699-1505, this the 21st day of February, 2002. Crawford and Glover were advised of the plaintiff's intention to file motions for sanctions and did not indicate any willingness to discuss them.

Christopher Langdon, Plaintiff "s/_____".
1835 Edwin Blvd., Winter Park, Fla. 32789

Suscribed to and sworn before me, this the 21st day of February, 2002.

Notary Public "s/_____".
April Jinnette Hittel
My Commission # CC 781369
EXPIRES: October 7, 2002

SEP 3 2002

No. 02-12

In The

Supreme Court of the United States

CHRISTOPHER LANGDON,

Petitioner,

v.

J.J. SWAIN, F.D. MARTIN, JACK MURDOCK, LYNDO TIPPETT, NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, ROY COOPER, NORTH CAROLINA DEPARTMENT OF JUSTICE, AND STATE OF NORTH CAROLINA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

Plaintiff presents eleven questions for review in his Petition (Pet. pp. i - iii), but presents only six distinct issues for argument which consolidate several of the questions presented. Defendants thus propose six questions presented that correspond to Plaintiff's argument.

I. **Whether Plaintiff's Complaints were properly dismissed as frivolous and malicious?**

II. **Whether Plaintiff's takings claim was properly brought against employees sued in their individual capacity?**

III. **Whether Plaintiff's "papers" were not liberally construed?**

IV. **Whether the District Court abused its discretion by denying Plaintiff's Motion for Default Entry and granting Defendants' Amended Motions for Extensions of Time?**

V. **Whether the doctrine of *res judicata* was properly applied herein?**

VI. **Whether the District Court abused its discretion by denying Plaintiff's motion to recuse?**

LISTING OF PARTIES

Petitioner failed to list all Respondents in his Petition. The Respondents are J.J. Swain; F.D. Martin; Jack Murdock; Lyndo Tippett, Secretary of the North Carolina Department of Transportation; the North Carolina Department of Transportation; Roy Cooper, North Carolina Attorney General; the North Carolina Department of Justice; and the State of North Carolina. As stated by Petitioner, Dave Henderson is not a party to this case, as he was never served with a Complaint.

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CITATIONS OF LOWER COURT OPINIONS

None of the opinions and orders entered by the lower courts were published. The opinions and orders at issue are: (1) *Langdon v. Swain*, No. 1:01CV139 (W.D.N.C. July 27, 2001) (order granting Defendants' amended motions for extension of time to answer and denying Plaintiff's motion for default entry); (2) *Langdon v. Tippett*, No. 1:01CV107, and *Langdon v. Swain*, No. 1:01CV139 (W.D.N.C. Aug. 6, 2001) (order consolidating and dismissing cases, and separate order denying Plaintiff's motions for change of venue and to recuse); (3) *Langdon v. Swain*, Nos. 01-1975 and 01-2019 (4th Cir. Mar. 12, 2002).[1]

JURISDICTION OF THIS COURT

The opinion of the Fourth Circuit Court of Appeals was entered on February 20, 2002, and refiled March 12, 2002 to correct a technical error. Petitioner filed a timely petition for rehearing and rehearing en banc, which was denied April 11, 2002. This Court may review on a writ of certiorari the judgment at issue pursuant to 28 U.S.C. § 1254(1).

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[1]This opinion may also be found at *Langdon v. Swain*, 2002 U.S. App. LEXIS 2680 (4th Cir. Feb. 20, 2002).

STATUTORY PROVISIONS INVOLVED

The principal statutory provisions involved in this case are 42 U.S.C. § 1983, 28 U.S.C. § 1915, and 28 U.S.C. § 455.

STATEMENT OF THE CASE

Plaintiff filed case 1:01CV107 against Defendants Lyndo Tippett, North Carolina Department of Transportation (NCDOT), Roy Cooper, North Carolina Department of Justice, and the State of North Carolina in United States District Court, Western District of North Carolina, on May 21, 2001, alleging that numerous statutes of the state of North Carolina relating to condemnation of land and/or statutes of limitation are unconstitutional. Plaintiff's basis for jurisdiction in federal court appears to have been the existence of a federal question.[2] 28 U.S.C. § 1331. Defendants timely filed Answer July 26, 2001, asserting, *inter alia*, the doctrine of *res judicata* as a defense.

Plaintiff filed case 1:01CV139 against three current or former NCDOT employees, J.J. Swain, Jack Murdock, and F.D. Martin, in United States District Court, Western Dis-

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[2]Plaintiff asserts in his Petition that this suit was brought pursuant to 42 U.S.C. § 1983, and that 28 U.S.C. § 1343 was one basis for jurisdiction. (Pet. p. 2) However, neither statute was mentioned in Plaintiff's Complaint.

trict of North Carolina, on June 18, 2001. Plaintiff sued the Defendants in their individual capacities, ostensibly for a taking of his property through inverse condemnation, and sought $117,179.00 in compensatory damages for the taking of his real property and his business; $200,000.00 in "compensatory" damages for the deprivation of his constitutional rights and pain and suffering; $50,000.00 in legal expenses; and $300,000.00 in punitive damages. Plaintiff's basis for jurisdiction in federal court appears to have been the existence of a federal question and diversity of citizenship. 28 U.S.C. § 1331, 1332.

Defendants Swain and Martin were served with the Complaint on June 29, 2001, while Defendant Murdock was served on June 28, 2001. On July 19, 2001, Defendants jointly served a "Motion for Extension of Time to Answer." Defendants Swain and Martin (together) and Defendant Murdock (alone) served separate documents entitled "Amended Motion for Extension of Time to Answer" on July 20, 2001, after Defendants' counsel realized that the initial Motion for Extension of Time was served one day after time to serve such pleading had expired as to Defendant Murdock. Defendant Murdock's amended motion acknowledged that time had expired, but stated that Defendant Murdock would be "greatly prejudiced by a default judgment." (Pet. App. p. 102)

Plaintiff served a "Motion for Default Entry by the Clerk of Court" on July 19, 2001. Defendants' Motion for

Extension of Time and Amended Motions for Extension of Time, and Plaintiff's Motion for Default Entry, were all filed in the Clerk's Office on July 23, 2001. On July 27, 2001, Magistrate Judge Max O. Cogburn granted Defendants' Amended Motions for Extension of Time and denied as moot Plaintiff's Motion for Default Entry. Defendants were granted up to and including August 17, 2001, to answer Plaintiff's Complaint. Plaintiff timely appealed this Order, which appeal was assigned case number 01-1975 by the Fourth Circuit Court of Appeals.

On August 6, 2001, prior to the time in which Defendants were required to file answer in case 1:01CV139, District Judge Lacy H. Thornburg entered Orders consolidating cases 1:01CV107 and 1:01CV139, dismissing both cases *sua sponte*, and denying Plaintiff's motions for change of venue and to recuse. Plaintiff timely appealed these Orders, which appeal was assigned case number 01-2019 by the Fourth Circuit Court of Appeals.

The Fourth Circuit consolidated the two appeals. Plaintiff presented three issues for appeal: (1) whether the July 27, 2001 order granting Defendants' Amended Motion for Extension of Time was proper; (2) whether Judge Thornburg should have recused himself from these cases; and (3) whether the August 6, 2001 order dismissing Plaintiff's Complaints *sua sponte* was proper. The Court of Appeals entered an opinion affirming each or-

der of the lower court on February 20, 2002, which opinion was amended to correct a technical error on March 12, 2002. The Court of Appeals also denied several motions filed by Plaintiff in that court: a Motion to Strike the Appellee's informal brief; four Motions for Sanctions;[3] and a Motion for Default Judgment.

ARGUMENT

Before proceeding, Respondents feel obliged to note that Petitioner has failed to "amplify[] the reasons relied on for allowance of the writ," as required by Rule 14(1)(h) of the Rules of this Court. Petitioner has not argued in his Petition that any of the reasons for granting a petition for writ of certiorari, contained in Rule 10 of the Rules of this Court, apply herein. Instead, Petitioner treats his Petition as if it were his Brief on the Merits for Petitioner. Respondents will address the contentions in the Petition,

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[3]Thus, contrary to Plaintiff's assertion, these motions were not "ignored" by the Circuit Court. (Pet. p. 3) Plaintiff also makes reference in his Petition (pp. 16, 20) to Defendants' perceived failure to respond to his motions for sanctions. Pursuant to Fourth Circuit Local Rule 27(d), Defendants were not required to respond to these motions. Plaintiff's assertion that such failure to respond constitutes an admission of the allegations contained in his motions for sanctions is meritless. Finally, Defendants object to Plaintiff's placement of "edited" versions of his informal briefs and motions for sanctions in the Appendix. (Pet. App. pp. 114, 120, 129, 134, 141) Plaintiff should have included each document in its entirety, or excluded them altogether.

but will also address whether there are any "compelling reasons" for granting the petition in this case. Rule 10.

I. Plaintiff's Complaints were properly dismissed as frivolous and malicious

Plaintiff first argues it was improper for the district court to dismiss his Complaints pursuant to 28 U.S.C. § 1915(e)(2), because that statute only applies to Complaints filed by prisoners. Defendants do not dispute that Plaintiff was not a prisoner at the time his Complaints were filed, and that Plaintiff has not requested *in forma pauperis* status.

It appears the Fourth Circuit has never squarely addressed the issue of whether 28 U.S.C. § 1915(e)(2) applies to non-prisoner, non-*in forma pauperis* Complaints. Plaintiff is correct that other circuits have held that the statute only applies to *in forma pauperis* claims. *See Grayson v. Mayview State Hosp.*, 293 F.3d 103, n. 10 (3rd Cir. 2002); *Benson v. O'Brian*, 179 F.3d 1014, 1017 (6th Cir. 1999) (citing cases from 5th, 8th and 9th Circuits). If the Fourth Circuit's opinion herein conflicts with that of other Circuits, such conflict is immaterial as the opinion herein was an unpublished opinion with little precedential value.

Further, though both lower courts did mention 28 U.S.C. § 1915 in their orders herein, federal courts have the inherent power, independent of the application of that statute, to dismiss Complaints as frivolous or malicious. The federal courts have inherent powers to "fashion an appropriate sanction for conduct which abuses the judicial process," though they must exercise those powers "with restraint and discretion." *Chambers v. NASCO*, 501 U.S. 32, 44-45 (1991). "[T]here is little doubt" that the federal courts have the inherent power to dismiss a case as frivolous or malicious. *Mallard v. United States Dist. Court for Southern Dist.*, 490 U.S. 296, 307-08 (1989); *see also Fitzgerald v. First East Seventh St. Tenants Corp.*, 221 F.3d 362, 364 (2nd Cir. 2000) (affirming *sua sponte* dismissal of *pro se* plaintiff's frivolous complaint).

Both the District and Circuit Court herein found Plaintiff's Complaints to be frivolous and malicious, and dismissed the Complaints on those grounds, with a (perhaps erroneous) citation to 28 U.S.C. § 1915. However, Plaintiff fails to show any abuse of discretion in the courts' exercise of their inherent powers to dismiss his Complaints as frivolous or malicious, and has presented no compelling reason why his frivolous lawsuits should be the subject of review in this Court. *See* Rule 10.

II. There is no compelling reason for this Court to review a potentially erroneous alternative holding of the Fourth Circuit in an unpublished opinion

The Fourth Circuit noted in its opinion herein that *Langdon v. Swain* (1:01CV139), a case brought against three NCDOT employees in their individual capacities, was subject to dismissal for failure to state a claim upon which relief could be granted "because takings actions sound against governmental entities rather than individual state employees in their individual capacities."[4] (Pet. App. p. 18(a)) However, it appears the court may have overlooked Plaintiff's assertions that his claim was based on 42 U.S.C. § 1983, under which it is permissible to sue a state official in his individual capacity upon an allegation that the official, acting under color of law, deprived the plaintiff of a federal right, *see Hafer v. Melo*, 502 U.S. 21 (1991), though the defense of qualified immunity is available to the official, *see id.; see also Harbert Int'l v. James*, 157 F.3d 1271 (11th Cir. 1998) (qualified immunity may protect official from takings claim brought against official in his individual capacity).

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[4]Plaintiff misconstrues the Fourth Circuit's opinion. The court did not state that takings claims "are not allowed in federal court against state officials," (Pet. p. 6) but rather limited its opinion to the situation presented here: state employees sued in their individual capacity.

Even if Plaintiff may have stated a claim upon which relief could be granted, the Fourth Circuit and District Court both held that Plaintiff's claim against the individual employees was also barred by *res judicata* and was a frivolous claim subject to *sua sponte* dismissal, without a "hearing"as Plaintiff now requests. (Pet. p. 7) The court's power to dismiss Plaintiff's claim *sua sponte* as frivolous is discussed above in section I; the application of *res judicata* is discussed below in section V. As discussed therein, Plaintiff's Complaint was properly dismissed by the lower courts.

Plaintiff has failed to present a compelling reason why this Court should grant his Petition, based on a potentially erroneous alternative holding of the Fourth Circuit, presented in an unpublished opinion with little precedential value. *See* Rule 10.

III. Plaintiff has presented no evidence that his "papers" were not liberally construed

Plaintiff's third argument is centered around the maxim that the pleadings and papers of *pro se* litigants should be liberally construed. *See, e.g., Haines v. Kerner*, 404 U.S. 519, 520 (1972) (*pro se* complaint held to "less stringent standards than formal pleadings drafted by lawyers"). Plaintiff asserts this maxim was violated herein because (1) the lower courts "never stated that [his] papers had been liberally construed;" (2) no one provided

him with information about attorneys who provide services *pro bono*; (3) oral argument of *pro se* appeals is disfavored by the Fourth Circuit; and, (4) his motion to extend time to file a petition for rehearing in the Fourth Circuit was denied.

There is no requirement, constitutional or otherwise, that a lower court must state in its opinion that a *pro se* party's papers were "liberally construed;" that a *pro se* party be provided with a list of *pro bono* attorneys; that *pro se* parties are entitled to oral argument; or that *pro se* parties are entitled to more time to file petitions for rehearing than parties who retain an attorney. Plaintiff has presented no other evidence or argument showing that his "papers" were treated improperly by any of the lower courts, and has presented no compelling reason why this alleged impropriety provides the basis for a grant of his Petition for writ of certiorari. *See* Rule 10.

IV. The District Court did not abuse its discretion by denying Plaintiff's Motion for Default Entry and granting Defendants' Amended Motions for Extension of Time

Plaintiff next argues the District Court erred by granting Defendant's Amended Motions for Extension of Time filed in *Langdon v. Swain*, 1:01CV139. As discussed above, Defendants Swain, Martin, and Murdock jointly served a Motion for Extension of Time to Answer on July 19,

2001. However, Defendant Murdock's Motion for Extension of Time was served one day late.[5] Thus, on July 20, 2001, Defendants Swain and Martin (together) and Defendant Murdock (alone) served Amended Motions for Extension of Time, which recognized the mistake that had been made.

At approximately the same time, Plaintiff served a Motion for Default Entry and a Correction of Motion for Default Entry. Defendants' July 19 and 20 motions, and Plaintiff's motions for default entry, were all filed in the Clerk's office on July 23, 2001.

Plaintiff asserts that on these facts, default entry was mandatory. (Pet. pp. 10 - 11) However, given that all the motions arrived in the Clerk's office on the same day, Plaintiff cannot show that Defendants had "failed to plead or otherwise defend " before his motions for default entry were filed. Fed. R. Civ. P. 55(a). Default entry was thus not appropriate, and the district court did not abuse its discretion by denying Plaintiff's motion. *See Draper v. Coombs*, 792 F.2d 915, 924-25 (9th Cir. 1986) (district court did not abuse discretion by denying motion for

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[5]Plaintiff states on page 21 of his Petition that "the defendants in *Langdon v. Swain, Martin and Murdock* are in default," thus implying that all three Defendants filed untimely Motions for Extension of Time. (Pet. p. 21) This is simply not true, as the July 19, 2001 Motion for Extension of Time was timely filed as to Defendants Swain and Martin.

default entry that was filed on same day as late answer).

In his order granting Defendants' Amended Motions to Extend Time, the Magistrate Judge found that "defendants' error in seeking the proposed extensions was based upon a misunderstanding as to when defendants were served, and that defendants took prompt remedial action, [such that] the court attributes the error to excusable neglect and will grant the proposed extensions, which moots plaintiff's motions." (Pet. App. p. 2) Motions for extensions of time filed "after the expiration of the specified period" may be permitted "where the failure to act was the result of excusable neglect." Fed. R. Civ. Proc. 6(b)(2).

Excusable neglect "is a somewhat 'elastic concept' and is not limited strictly to omissions caused by circumstances beyond the control of the movant," but may also "extend to inadvertent delays." *Pioneer Inv. Serv. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380, 392 (1993) (footnotes omitted). Courts may thus accept "late filings caused by inadvertence, mistake or carelessness." *Id.* at 388. The late filing of the motion in the instant case was due to neglect: the failure to correctly calculate the deadline for filing. *See Sugarbaker v. SSM Health Care*, 187 F.3d 853, 856 (8th Cir. 1999) (filing of motion one day late due to miscalculation of deadline deemed result of "neglect"), *cert. denied*, 528 U.S. 1137, 120 S. Ct. 980, 145 L. Ed. 2d 931 (2000). However, the neglect must also be deemed

"excusable" before relief can be granted. *See id.; see also Pioneer*, 507 U.S. at 395.

The determination of whether neglect is excusable is an "equitable" determination, and the court should consider "the danger of prejudice to the [non-movant], the length of the delay and its potential impact on judicial proceedings, the reason for the delay . . ., and whether the movant acted in good faith." *Pioneer*, 507 U.S. at 395.

Because the length of delay herein was only one day, and because timely Motions to Extend Time had been filed with respect to two of the three Defendants, there was no danger of prejudice to Plaintiff and no detrimental impact to the judicial proceedings. *See Sugarbaker*, 187 F.3d at 856. Further, the delay was due to a misunderstanding, and was promptly remedied by the Defendants, thus showing good faith.

Plaintiff's allegations of bad faith[6] on the part of the Defendants concern, for the most part, alleged conduct of the Defendants that has no relation to the untimely Motion for Extension of Time. (Pet. pp. 17 - 21) Plaintiff's more relevant allegations – regarding Defendant Mur-

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[6]Plaintiff also alludes to some undefined prejudice to him that resulted from the one day delay. (Pet. p. 21) However, as Plaintiff has not specified the alleged prejudice, Defendants have nothing concrete to respond to and will not address this facet of Plaintiff's argument.

dock's handling of his Complaint and Plaintiff's contact with Defendants' counsel (Pet. pp. 14, 16) - also do not show bad faith in Defendant Murdock's failure to timely file an extension. Those allegations merely show, as Defendants contend, that Defendants' counsel mistakenly filed the Motion for Extension of Time one day late as to Defendant Murdock, because of confusion over the date he was served and consequent miscalculation of the deadline for replying.

"A district court's ruling on excusable neglect is reviewed for abuse of discretion." *United States v. Borromeo*, 945 F.2d 750, 754 (4th Cir. 1991). The Fourth Circuit applied that standard below and found no abuse of discretion.

As the Fourth Circuit applied "a properly stated rule of law," and as Plaintiff presented no compelling reason for review of the treatment of the motions at issue, this Court should refrain from granting Plaintiff's Petition on this ground. *See* Rule 10.

V. Plaintiff's Complaints were properly dismissed as frivolous on the grounds of *res judicata* and/or failure to state a claim and qualified immunity

Plaintiff's fifth argument concerns the lower court's application of *res judicata*. Plaintiff rehashes several argu-

ments in this section that are responded to elsewhere.[7] Plaintiff also argues that the defense of *res judicata* should "have failed" because (1) the district court did not hold a hearing; (2) "the defendants in *Langdon v. Swain* filed no answer" and the District Court improperly raised the defense of *res judicata;* (3) the district court did not cite the "N[orth] C[arolina] law of *res judicata;*" (4) the entire record of the case upon which *res judicata* was based was not submitted to the district court; (5) the judgment upon which *res judicata* was based was not a valid judgment; and, (6) the privity element of *res judicata* was not satisfied.[8] Defendants will respond to these contentions in turn.

(1) The District Court dismissed Plaintiff's Complaints in both *Langdon v. Tippett* (1:01CV107) and *Langdon v. Swain* (1:01CV139) *sua sponte*, without any motion to dismiss in front of the court. A *sua sponte* dismissal, without a formal hearing, is appropriate when the court finds the Complaint to be frivolous. *Fitzgerald*, 221 F.3d at 363.

(2) A motion for extension of time filed by the Defendants in *Langdon v. Swain* was granted, thus extending

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[7]Plaintiff's arguments (b) and (c) on page 23 of his Petition correspond to sections III and I of this Response, respectively.

[8]These 6 arguments are taken from Plaintiff's arguments (a), (d) and (e), (f), (g), (i) - (k), and (h), respectively. (Pet. pp. 22 - 28)

their time to answer until August 17, 2001. However, the Defendants did not file an answer in that case because the District Court, *sua sponte*, dismissed the Complaint on August 6, 2001. The court also consolidated *Langdon v. Swain* with *Langdon v. Tippett*. An answer had been filed in the latter case, in which the doctrine of *res judicata* was raised as an affirmative defense. Thus, the District Court did not raise the defense of *res judicata* on its own motion, as Plaintiff states. (Pet. p. 23)

(3) The District Court in its order dismissing Plaintiff's Complaints discussed the law of *res judicata*, but did not cite specifically to North Carolina case law. *See Artis v. Norfolk & Western Ry.*, 204 F.3d 141, 147 (4th Cir. 2000) (federal court must "follow state preclusion law to determine the *res judicata* effect of a state court judgment"). However, the cases cited by the District Court espouse the same principles that North Carolina courts follow when applying *res judicata*: that a final judgment on the merits in a prior case bars a later suit "involving the same claim between the same parties or those in privity with them," as well as "relitigation of all matters that were or should have been adjudicated in the prior action." *Bockweg v. Anderson*, 333 N.C. 486, 491-92, 428 S.E.2d 157, 161 (1993). Further, the Fourth Circuit did base its decision regarding *res judicata* on North Carolina caselaw.

(4) Defendants raised the defense of *res judicata* in their Answer in *Langdon v. Tippett* (1:01CV107) with a

reference to *Langdon v. NCDOT*, Polk County (NC), 98 CVS 139, and its subsequent appellate history,[9] but did not attach to their Answer any of the documents filed in that previous case. However, Plaintiff's Complaint and attachments filed in *Langdon v. Swain* showed on their face that *res judicata* was applicable.

Paragraph 25 of the Complaint states that Plaintiff filed a complaint against NCDOT in Polk County, NC, given case number 98 CVS 139, and also filed a second suit with the North Carolina Industrial Commission (Pet. App. p. 81); paragraphs 26 through 28 reference a release signed by Plaintiff that terminated the Industrial Commission case and that was attached to Plaintiff's instant Complaint as Exhibit 10 (Pet. pp. 81 - 82). Plaintiff did not include the release in his Appendix; thus, Defendants have included it in their Appendix herein. The release clearly states that case 98 CVS 139, *Langdon v. NCDOT*, was an "inverse condemnation claim." (Res. App. p. 1a) Paragraph 47 of the Complaint states that NCDOT won a motion for summary judgment in case 98 CVS 139. (Pet. App. p. 91)

Thus, Plaintiff, through his Complaints and Exhibits, admitted that Plaintiff had filed an inverse condemnation suit against NCDOT in 1998, and that NCDOT won on

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[9]*Langdon v. NCDOT*, 138 N.C. App. 553, 536 S.E.2d 366, *cert. denied*, 352 N.C. 675, 545 S.E.2d 425 (2000).

summary judgment. *Langdon v. Tippett* (1:01CV107) questions the constitutionality of several condemnation and related statutes, while *Langdon v. Swain* (1:01CV139) seeks "damages for the taking of [Plaintiff's] real property." (Pet. App. 99) The District Court held that the claims presented in the instant Complaints (*Langdon v. Tippett* and *Langdon v. Swain*) could have been brought in the earlier action, and were thus barred by the doctrine of *res judicata*.

(5) Plaintiff baldly asserts that the prior judgment on which *res judicata* was based, *Langdon v. NCDOT*, 98 CVS 139, was not a valid judgment. Plaintiff does not explain in his Petition why said judgment was not valid, but merely alludes to previous filings he has made where he allegedly explained why the prior judgment is not valid. Plaintiff then asserts that Defendants never denied his prior assertions that the judgment was not valid. As Plaintiff does not cite the prior filings to which he alludes, Defendants cannot respond to this assertion. Defendants deny that they have ever admitted that the judgment in *Langdon v. NCDOT*, 98 CVS 139, is not a valid judgment.

(6) Finally, Plaintiff asserts *res judicata* does not apply herein, because the identity of the parties or privity of the parties element was not satisfied. The defendant in *Langdon v. NCDOT*, 93 CVS 139, was solely NCDOT. The Defendants in the instant cases are NCDOT and its Secretary

of Transportation; the North Carolina Department of Justice and its Attorney General; the state of North Carolina; and three current or former NCDOT employees. Plaintiff argues only that the employee-defendants (Swain, Martin, and Murdock) should not be held to be in privity with the State of North Carolina. (Pet. pp. 26 - 27) Defendants assume Plaintiff meant to argue that the employee-defendants should not be held to be in privity with NCDOT, as NCDOT was the defendant named in the case at issue, 98 CVS 139.

It is clear that the Defendants in *Langdon v. Tippett*, which consist of two agencies, the State of North Carolina, and two agency heads presumably sued in their official capacity, are in privity with the agency sued in *Langdon v. NCDOT*. *See Gregory v. Chehi*, 843 F.2d 111, 120 (3rd Cir. 1988). However, Plaintiff asserted in his Complaint in *Langdon v. Swain* that he was suing the three current or former NCDOT employees named therein in their individual (or personal) capacities. (Pet. App. p. 55) Though it appears North Carolina courts have never directly addressed the issue, federal courts hold that employees sued in their individual capacities are not generally considered to be in privity with the government for purposes of claims brought under 42 U.S.C. § 1983.[10] *See*

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[10]No federal cases specifically discuss the situation presented herein - a plaintiff making a takings claim under 42 U.S.C. § 1983 - and how that might affect the analysis.

Gray v. Lacke, 885 F.2d 399, 405-06 (7th Cir. 1989), *cert. denied*, 494 U.S. 1029, 110 S. Ct. 1476, 108 L. Ed. 2d 613 (1990).

Thus, it may not have been appropriate for the lower courts to dismiss Plaintiff's Complaint in *Langdon v. Swain* on the grounds of *res judicata*. However, there are alternative bases for dismissing said Complaint: Plaintiff has failed to state a claim upon which relief can be granted, and Defendants Swain, Martin and Murdock are entitled to qualified immunity. *See Harbert Int'l*, 157 F.3d 1271.

Plaintiff's Complaint alleges only that the three Defendants knew about the landslide or landslides that had occurred on his property; did nothing about the alleged damage to his property; "blamed" him for the landslide or landslides; and concealed information from him regarding NCDOT design practices. (Pet. App. pp. 77, 78, 80, 87) Plaintiff has not alleged any conduct on the part of any of the named Defendants that actually caused the landslide or landslides or otherwise resulted in a taking of his property, the only alleged violation of his rights for which he seeks remedy. (Pet. App. p. 99)

Plaintiff has thus failed to state a claim by failing to establish that the conduct of Defendants deprived him of his constitutional right to be free from a taking without just compensation. *See American Mfrs. Mut. Ins. Co. v.*

Sullivan, 526 U.S. 40, 49 - 50 (1999). Further, Defendants are entitled to qualified immunity, as the actions they are alleged to have taken "are not clearly established to be beyond the boundaries of [their] discretionary authority[, . . . and no] reasonable official in the defendant[s'] position would have understood" that the alleged conduct went beyond the limits of his statutory authority. *Better Gov't Bureau v. McGraw (In re Allen)*, 106 F.3d 582, 593 (4th Cir. 1997), *cert. denied*, 522 U.S. 1047, 118 S. Ct. 689, 139 L. Ed. 2d 635 (1998).

Thus, the decision of the lower courts to dismiss Plaintiff's Complaints as frivolous should be upheld. *See Hall v. Quillen*, 631 F.2d 1154, 1155 (4th Cir. 1980) (appellate court may affirm on grounds other than those stated by district court), *cert. denied*, 454 U.S. 1141, 102 S. Ct. 999, 71 L. Ed. 2d 293 (1982).

In short, Plaintiff has failed to present a compelling reason why this Court should grant his Petition. *See* Rule 10.

VI. The District Court did not abuse its discretion by denying Plaintiff's Motion to Recuse

Finally, Plaintiff appears to argue that it was error for the district judge to deny his motion to recuse.[11] Plaintiff asserts the district judge should have recused himself because (1) he was formerly the Attorney General for the State of North Carolina, and it would be "natural" for him "to identify with the interests of the State;" (2) in his position as Attorney General, he worked with the current Attorney General, Roy Cooper, and is a member of the same political party as Cooper; (3) the current Secretary of Transportation "possibl[y]" contributed "heavily" to Cooper's campaign for Attorney General; (4) Judge Thornburg "may have" defended the named Defendants in *Langdon v. Swain* (1:01CV107); and, (5) an attorney for NCDOT, not party to or counsel in this lawsuit, served under Judge Thornburg when he was Attorney General. (Pet. pp. 28-30)

---

[11]Plaintiff does not specifically argue for reversal of the dismissal of his Complaints on this ground, but Defendants have assumed that is the outcome Plaintiff seeks. Further, Plaintiff mentions in this section of the Petition a motion to transfer venue and alludes to a motion he made to enjoin "the noteholders and trustees." (Pet. pp. 28-30) As Plaintiff does not assert any error in the denial of these motions that justifies reversal of the dismissal of his Complaints, and as Plaintiff did not raise these issues as error in the Fourth Circuit, Defendants will not address those motions herein.

"[T]o constitute grounds for disqualification, the probability that a judge will decide a case on a basis other than the merits must be more than 'trivial.'" *United States v. DeTemple*, 162 F.3d 279, 287 (4th Cir. 1998) (citation omitted), *cert. denied*, 526 U.S. 1137, 119 S. Ct. 1793, 143 L. Ed. 2d 1020 (1999). Plaintiff's allegations, many of them couched in terms of things Judge Thornburg "may have" done, or things that other people "possibl[y]" did, simply would not lead a "reasonable, well-informed observer" to question Judge Thornburg's impartiality, *id.* at 286, and do not rise above the level of a "trivial" risk of bias, *id.* at 287.

Defendants ask this Court to take judicial notice that Judge Thornburg was commissioned to the federal bench in March 1995 and last served as Attorney General in 1992;[12] thus, he could not have been involved as Attorney General in any of the litigation brought by Plaintiff relating this case, which centers around events beginning in June of 1995.

Further, Plaintiff has submitted nothing beyond bald, unsubstantiated assertions to indicate that Judge Thornburg is, by necessity because of his former employment, biased in favor of the State of North Carolina. If Plaintiff's formulation of 28 U.S.C. § 455 were correct – that a

---

[12]This information is available from the website of the Federal Judicial Center, at http://www.air.fjc.gov/history/judges_frm.html.

former Attorney General is presumed to be biased, such that "his impartiality might reasonably be questioned," *id.* -- Judge Thornburg, and any other former Attorney General appointed to the federal bench, would be forced to recuse himself from every case in which the State he represented is a party, or in which a statute from that state is questioned.

A "district court judge's refusal to recuse himself" pursuant to 28 U.S.C. § 455 is reviewed "for abuse of discretion." *DeTemple*, 162 F.3d at 283. Plaintiff has not shown that Judge Thornburg abused his discretion by failing to recuse himself. Further, the Fourth Circuit applied the proper "rule of law" to review of the Motion to Recuse and found no abuse of discretion, and Plaintiff has presented no compelling reason for review of the treatment of that motion. This Court should thus refrain from granting Plaintiff's Petition on this ground. *See* Rule 10.

CONCLUSION

Plaintiff has not argued, and has made no showing, of any compelling reason , *see* Rule 10, which would justify review by this Court of claims found to be frivolous by both a District Court and the Fourth Circuit Court of Appeals. For the reasons stated above, this Court should not issue its writ of certiorari to review the decision of the Fourth Circuit Court of Appeals affirming the orders of the trial court.

Respectfully submitted,

ROY COOPER
North Carolina Attorney General

Robert O. Crawford, III*
Special Deputy Attorney General

Lisa C. Glover
Assistant Attorney General

September 3, 2002

**Counsel of Record*

APPENDIX

CONTAINING:

Exhibit 10 to Plaintiff's Complaint in *Langdon v. Swain*, 1:01CV139 (release signed by plaintiff in previous case)

NORTH CAROLINA INDUSTRIAL COMMISSION
RALEIGH, NORTH CAROLINA

RELEASE OF TORT CLAIMS UNDER GENERAL STATUTES 143-291 *et seq*

I.C. File No. TA-15328

KNOW BY ALL MEN BY THESE PRESENTS, That I, We, for the sole consideration of TWO THOUSAND DOLLARS ($2,000.00) to be paid by the NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, the payment whereof being made under the provision of General Statutes 143-291 et seq., I, We, have released, and discharged and by these presents do for myself, ourselves, my, our heirs, executors, administrators and assigns release and forever discharge the NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, its officers and employees, including J. J. Swain, Jr., Dennis Allen, F. D. Martin, and Russell Glass, its servants and agents, of and from any and all claims, demands, damages, actions, causes of action or whatever kind or nature, excepting only the purported inverse condemnation claim set forth in Christopher Langdon v. North Carolina Department of Transportation, Polk County Superior Court File No. 98-CVS-139, on, account of a landslide which began on or about June of 1995 on the property of Christopher Langdon located on State Road 1116, Hogback Mountain Road in Polk County, North Carolina, resulting in alleged dam-

ages to the aforementioned real property of Christopher Langdon and alleged damage to the reputation of Christopher Langdon.

I, We, understand that this release is made as compromise to avoid expense and to terminate all controversy and/or claims for injuries or damages of whatever nature, known or unknown, including future developments thereof, in any way growing out of or connected with said incident or aforementioned landslide, excepting only the aforementioned purported inverse condemnation claim set forth in Christopher Langdon v. North Carolina Department of Transportation, Polk County Superior Court File No. 98-CVS-139. We, agree that the sum paid is solely by way of compromise of disputed claims, and it is therefore specifically agreed that this release shall be a complete bar to all claims or suits for injuries or damages of whatsoever nature resulting from said incident, excepting only the purported inverse condemnation claim set forth in Christopher Langdon v. North Carolina Department of Transportation, Polk County Superior Court File No. 98-CVS-139.

IN WITNESS THEREOF, I, We, have hereunder set my, our, hand(s), this the 1st day January, 1999.

/s/ Doug H. Best
Witness

3107 S. Memorial Dr.,
Greenville, NC 27834
Address

/s/ Christopher Langdon
CHRISTOPHER LANGDON
Claimant
307 West Church Street
Farmville, North Carolina
27828

APPROVED:

MICHAEL F. EASLEY
ATTORNEY GENERAL

By: /s/ Michael C. Warren
Michael C. Warren
Assistant Attorney General
North Carolina Department of
Justice
124 College Street, Suite 300
Asheville, NC 28801
828/251-6083

Supreme Court, U.S.
FILED
OCT 3 2002
CLERK

No: 02-12

In The

Supreme Court of the United States

Christopher Langdon, Petitioner,

v.

Lyndo Tippett, Roy Cooper et al.

consolidated with:

Christopher Langdon, Petititoner,

v.

J.J. Swain, Jack Murdock, F.D. Martin et al.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Fourth Circuit

REVISED REPLY BRIEF

Christopher Langdon
Pro Se
1835 Edwin Blvd.
Winter Park, Fla. 32789
407-647-7539

19 pp

QUESTIONS PRESENTED FOR REVIEW

I filed two complaints in the W.D.N.C. *Langdon v. Swain* seeks damages against three NCDOT (current or former) employees in their individual capacities. *Langdon v. Tippett and Cooper* challenges the constitutionality of several *N.C.* statutes. The defendants in *Langdon v. Swain et al.* are in default and they failed to meet any of the requirements to set aside the default. Instead of entering a default and a default judgment, the district court consolidated the cases and dismissed them *sua sponte*, without notice and opportunity to be heard, under 28 U.S.C., Section 1915(e)(2), the informa pauperis statute, despite the fact that neither case was filed under 28 U.S.C. and no other federal court has ever dismissed a fully paid, non-prisoner, non-in forma pauperis complaint via 28 U.S.C. 1915(e)(2). The Fourth Circuit of the U.S. Court of Appeals affirmed. However, the Respondents now admit to several critical errors in the district court's opinion and the Fourth Circuit's opinion. They now alleged several new defenses and arguments for the first time.

(1) May a fee-paid (in full), non-prisoner, non-informa pauperis complaint be dismissed under the informa pauperis statute, 28 U.S.C., Section 1915(e)(2) ?

(2) May a federal court dismiss state law

claims, pendent and/or diversity based, via 28 U.S.C., Section 1915(e)(2) ?

(3) Are the pleadings and papers of a pro se party required to be liberally construed ?

(4) Are suits against state employees, sued in their individual capacities, for the deprivation of property without just compensation, allowed in the federal courts, contrary to the Forth Circuit's ruling ?

(5) May a U.S. District Court dismiss a case, *sua sponte*, based on an allegation of *res judicata*, without notice and an opportunity to be heard on the alleged issue?

(6) May a U.S. Court of Appeals dismiss a case, *sua sponte*, for failure to state a claim, without notice and opportunity to be heard ?

(7) When a plaintiff makes a valid request for the entry of default under Rule 55(a), F. R. Civ. Proc., is the entry of default mandatory, or, is it discretionary ?

(8) May a default be set aside without any showing of a meritorious defense, good faith, lack of prejudice to the plaintiff, and without any affidavits ?

(9) Is a plea of *res judicata* waived if not raised at the district court level and, if properly raised, what requirements must be met to prove it ?

(10) Did the district court have jurisdiction to dismiss my claim for the deprivation of my property ?

(11) Did the district court judge erroneously deny my motion to transfer my cases and my motions to recuse ?

(12) May a Respondent raise several new alleged defenses and arguments (including qualified immunity) before the U.S. Supreme Court that weren't raised in the lower courts ? (This question has been added because the Respondents have raised, for the first time several alleged defenses in their brief)

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I. ARE PRO SE PLEADINGS AND PAPERS REQUIRED TO BE LIBERALLY CONSTRUED ?

The dictum that the papers of a pro se party are to be liberally construed is well established. *Haines v. Kerner,* 404 U.S. 519 (1972).

A *pro se* civil rights complaint's allegations should be read expansively and taken as true. *White v. Bloom,* 621 F. 2d 276 at 276 [1](8th Cir.1980). Although I asked that my papers be liberally construed, the lower courts refused to do so, which is an abuse of discretion. *Traguth v. Zuck,* 710 F. 2d 90, 95 (2nd Cir.1983)

Allowing *pro se* parties a fair hearing is important to the vast majority of Americans who cannot afford attorneys in complex litigation. Should our civil courts be accessible only to a wealthy few? My cases were erroneously dismissed, via 28 U.S.C. 1915, which the defense now admits is irrelevant, without a hearing, the essence of due process of law. The Respondents now admit in their brief (Rsp..B.) to at least 3 critical errors in the 4th Cir.'s opinion, an opinion that threatens me with sanctions. Despite the admitted errors, the Respondent's attorneys are asking for sanctions in another case [see Supplemental Brief], based on the unpublished rulings [29 F. Appendix 171], which may be cited in other proceedings, if a copy is attached.

Certiorari may be granted under Rule 10 because the opinions below are a gross departure from the usual course of judicial rulings.

II. MAY STATE OFFICIALS BE SUED IN THEIR INDIVIDUAL CAPACITIES IN FEDERAL COURT FOR A TAKING OF PROPERTY?

The respondents admit in their brief (Rsp. B., p.8]these suits are allowed. The erroneous, *sua sponte* dismissal of *Langdon v. Swain et al.* for failure to state a claim by the 4th Cir. proves that my suits were not liberally construed and not given proper consideration. I responded to the *sua sponte* ruling in my *Petition for Rehearing*, which was denied. I am not aware of any other Circuit that allows a *sua sponte* dismissal for failure to state a claim without notice and an opportunity to be heard. Therefore, I seek review of this issue under Rule 10.

III. MAY A FEDERAL COURT IGNORE RULES 12 & 55, F.R.C.P., IN REMOVING A DEFAULT ?

Swain, Martin and Murdock are in default and never filed an answer. The Respondents erroneously equate the filing of a Rule 6(b) motion with a responsive pleading/motion under Rule 12 that automatically extends the filing time.

"..all the motions [Petitioner's & Respondents'] arrived at the Clerk's office on the same day, Plaintiff cannot show that Defendants had 'failed to plead or other wise defend' before his motions for default entry were filed. Fed R. Civ.P.55(a)." R. B., pg.11

Rule 55 states: "fails to plead or otherwise

defend *as provided by these rules,"* referring to the requirements of Rule 12. *Atl. St. Sply. Co. v. Int. Mart. Sply. Co.,* 268 F. Supp. at 1009 [2] (S.D.N.Y. 1967). It is argued that the first Rule 6(b) motion was one day late for defendant Murdock and timely with regards to Swain and Martin. However, that first motion was denied by Mag. Judge Cogburn (App.I, p.1-3) and never appealed. There's no copy of it in the Resps. App. Murdock's answer was due on 7-18-01, Swain's and Martin's on 7-19-01. The amended Rule 6(b) motions were signed on 7-20-01 and erroneously allowed on 7-27-01.

The 4th Cir. ruled that the district court was allowed to "reopen" the period for filing, although no motion to set aside a default entry and/or to vacate a default judgment [Rules 55, 60] were filed. I filed verified motions for: default entry; default judgment; to strike the defendants Rule 6(b) motions and; a response to the Rule 6(b) motions. No answer to the motions was filed. *The district court never ruled on my motion to strike the defendants' Rule 6(b) motions.*

The entry of a default is mandatory. If the clerk fails to, the court should. *Fisher v. Taylor,* 1 F.R.D. 448 (E.D. Tenn.1940). Failure to enter a default doesn't excuse it. *Orange Theat. Corp. v. Rayhertz,* 130 F. 2d 185, 187 (3d Cir. 1942). Rule 6(b) motions may be construed as motions to set aside a default entry. However, their Rule 6(b) motions didn't meet the criteria

to do so. Courts require good faith, a supporting affidavit, a meritorious defense, prompt action, and lack of prejudice to the plaintiff. *Sony Corp v. Elm State*, 800 F. 2d at 320 (2nd Cir. 1986). Murdock *admitted* his default.
" Mr. Murdock would be greatly prejudiced by a default judgment in this case." .App.III, p.102

Judge Cogburn did not consider all the elements necessary to set aside a default. In *S. C. Natl. Bank v. Baker,* 20 F. Rules Service 3d 844 at 846-847 (4th Cir. 1991) [App. V. p.175), the 4th Circuit held that, although Baker had filed an answer only 12 days late, no meritorious defense was alleged, therefore, the default was upheld. Affidavits are essential. *Frost Belt Int.v. Cold Chillin'* , 758 F. S. 131 (S.D. N.Y. 1990]. They must show who is responsible for the default. *Hirtz v. Woma,* 92 F.R.D. 364, 368, 732 F. 2d 178 (3rd Cir.1984).The Respondents. cite *Draper v. Coombs,* 792 F. 2d 915 (9th Cir. 1986) in which the defendants filed a late *answer.* No answer or affidavits were filed in *Langdon v. Swain. See: Carnigan v. U.S.*, 48 F.R.D. 323 (D.Mass.1969)
" ..defendant filed a ..motion to set aside the default and attached to the motion was an affidavit of its general counsel. However, no answer was tendered for filing." *Consolidated Masonry & Fireproofing Co. v. Wagman Const. Co.*, 383 F. 2d 249 at 251 (4th Cir.1967).

My four verified motions for sanctions [App. III, p.129; App. IV, p.141] included a request

for a default in *Langdon v. Swain* because of the bad faith conduct of Swain, Martin and Murdock and the misrepresentations of law and fact in the "Appellees' Brief." [no copy of it is in their appendix]. My complaint [App.III, p. 74] shows their bad faith conduct and liability as does the *Petition* [pgs. 17-19]. The verified accusations are supported by an affidavit and an engineering report[App. III, p.107-112]. No denials of these accusations are in the in the Rsp. B. There was, and, is prejudice to me App.III, p.97] [App. V, p.].T here's no rational explanation for Murdock's default.

" Mr. Murdock mistakenly disposed of Plaintiff's complaint when first received by him, as he believed it was related to an earlier case filed by Plaintiff in state court." [App. III, p.102]

IV. SHOULD JUDGE THORNBURGH HAVE RECUSED HIMSELF ?

I moved to transfer my cases from Asheville (WDNC), to Charlotte (WDNC], because it's much closer. The motion was unopposed, thereby consented to. 28 U.S.C. 1404(b).

The *Petition* states [p.30] that there are numerous factual errors in Judge Thornburgh's dismissal order. The Rsp.B. doesn't deny that those errors exist. Judge Thornburgh acted as an advocate for the Respondents, not a neutral adjudicator. The misconduct of the defendants in *Langdon v. Swain* is

connected to misconduct by T.L. Mallonee, a NCDOT att., whom I believe served under Judge Thornburgh when he was att. gen. Mallonee illegally removed original, pertinent construction records to his office in Asheville, contrary to the N.C. Public Records Law [*Petition*, p..29-30]. *See*: "Supp. Brief."

V. MAY A NON-INFORMA PAUPERIS, NON-PRISONER SUIT BE DISMISSED VIA 28 U.S.C 1915(E)(2), ?

The defendants in *Langdon v. Swain et al.* never filed an answer. The defendants in *Langdon v.Tippett & Cooper* filed an answer but never alleged in their answer that my claims are frivolous or malicious. Therefore, the alleged issue was waived and is not litigated herein by implied consent.

"Appellate courts generally will not consider an issue or theory that was not raised in the district court." *Narey v. Dean*, 32 F. 3d 1521 at 1522 (1th Cir. 1994).

The erroneous dismissal, based on frivolous/ malicious, relied solely upon 28 U.S.C. 1915 (e)(2). The Respondents. now admit in their R.B., p.7., that 28 U.S.C. 1915 (e)(2) is not applicable to my suits, contrary to their arguments in their "Appellees' Brief."

The lower courts didn't dismiss my suits via the court's inherent power, nor were they asked to do so. It is too late to ask the Supreme

Court to do so now. See also: Supp. Brief.

No federal court, except in my two cases, has ever dismissed a fee paid, non-*in forma pauperis*, non-prisoner complaint under 28 U.S.C. 1915(e)(2).

VI. WAS THE ALLEGED DEFENSE OF RES JUDICATA PROPERLY RAISED AND MAY A FEDERAL COURT IGNORE 28 U.S.C 1738?

The defendants in *Langdon v. Swain* have waived their alleged defense of res judicata. They now admit that the defendants in *Langdon v. Swain*, sued in their personal capacities, are not in privity with a state agency.

" Thus it may not have been appropriate for the lower court to dismiss Plaintiff's Complaint in *Langdon v. Swain* on the grounds of *res judicata.*" R.B., page 20.

It is still argued for *Langdon v. Tippett,* although it was not properly raised and supported, thereby waived. The answer in *Langdon v. Tippett*, mentioned *res judicata.* My request to respond to the alleged issue was denied.

" ..trial courts may raise the issue of claim preclusion *sua sponte*.. the parties must have reasonable notice and opportunity to be heard before the application of claim preclusion.." 18 *Moore's Fed. Pract.*, 3d Ed., Sect. 131.5 (2001)

Because the alleged issue of *res judicata* was waived and I was not given an opportunity to respond to it at the district court level, I am not

litigating it by implied consent now. The answer in *Langdon v. Tippett* cited only one alleged state court judgment, *Langdon v. NCDOT* (98-cvs-139, Polk Cnty., N.C.), to support the erroneous argument of *res judicata.* The answer never cited 28 U.S.C. 1738, the Full Faith and Credit Statute, the proper statutory authority. *Dici v. Commonwealth of Penn.,* 91 F. 3d 52 at 542 (3rd Cir. 1996). 28 U.S.C. 1738 requires a certified copy of the record of an alleged prior state judgment pled in *res judicata. See: MGM D. Inn v. Holz,* 41 S.E. 2d 399 at 400 (N.C. App.1991]; *Ferguson v. Harwood,* 11 U.S. 408 (1813); *Moore v. Mabus,* 976 F. 2d 268 at 271 (5th Cir.1992). N.C. law requires the entire record. *T.Mc Innis Assocs. v. Hall,* 349 S.E. 2d 552, 563 (N.C.1986).The Respondents never supplied any documents from any prior case, certified or uncertified to the district court. The answer to *Langdon v. Tippett and Cooper* never cited the N.C. law of res judicata nor did the district court's order of dismissal. Only the federal law of res judicata was applied. The district court's dismissal order never cited, nor applied 28 U.S.C. 1738. The Resp. B. never mentions 28 U.S.C. 1738 and no alleged prior state court documents are attached.

See also: "Supplemental Brief."

VII. MAY THE RESPONDENTS RAISE THE ALLEGED RELEASE AGREEMENT AND QUALIFIED IMMUNITY AS ALLEGED

DEFENSES FOR THE FIRST TIME BEFORE THE SUPREME COURT ?

The Respondents assert, *for the first time*, that the alleged release agreement (R.B. App., p.1a] supports *res judicata* in *Langdon v. Tip-pett.* It was not raised as an alleged defense in the district court, nor with the 4th Cir. It was waived as a defense.

" In the Plaintiff-Appellant's informal brief regarding the second appeal, it is stated on page 27, 3rd line from the top [original format], that the alleged release agreement 'was procured through fraud and without proper consideration...The defendants-appellees never denied these assertions in their brief." "Reply Brief," App. V, pages 194-195.

"..there is no assertion [in the "Appellee's Brief"] that the present claims are barred by the alleged release agreement.." Appendix, Part V, pages 190-191.

Arguments not preserved are deemed abandoned. *N.Y. Life Ins. Co. v. Brown,* 84 F.3d 137, 138 [6-7] (5th Cir. 1996). Qualified immunity was not raised in the lower courts, hence, it was abandoned. *Harlow v. Fitzgerald*, 457 U.S.800, 815 (1982).

VII. DID THE DISTRICT COURT HAVE JURISDICTION TO DISMISS MY CLAIMS FOR THE DEPRIVATION OF MY PROPERTY ?

No. Under N.C.. law, a court lacks jurisdiction to hear a claim for a taking of property unless the noteholders and trustees are enjoined. My request for compensation for the taking [*Langdon v. Swain et al.*] seeks relief under N.C. law and/or federal law. I asked the WDNC to enjoin the noteholders and trustees and the motion was denied [App.I, p. 11-12] [*Pet.for Cert.*, p. 30][*Petition,* p. ii., Quest. 11] The respondents never answered the question.

Likewise, the court in 98-cvs-139 (N.C.) lacked jurisdiction because the noteholders and trustees were not enjoined in that case, therefore, 98-cvs-139 is void and can't support a plea of *res judicata.*

" *Rule 19. Necessary Joinder of Parties.* (a) those who are united in interest *must* be joined " Rule 19, N.C. R. Civ. P.

" ..the trustees and holder of a note on the real property in question were necessary parties.. *N. C. Civil Procedure*, 2nd Ed. , G. Gray Wilson, Michie, Volume I, Section 19-2,p. 379.

" Since persons united in interest are necessary parties, a judgment that determines a claim before proper efforts have been made to join one who is united in interest is **void**." Ibid at page 377. [*See:* Appendix III, p.127].

In 98-cvs-139 (Polk Cnty., N.C.), the N.C. Court of Appeals and the N.C. S. Court refused to address the jurisdictional question.

" If the question of jurisdiction was not litigated in the first action, it can be litigated

in the second.." *Civil Litigation*, Delmar Karlen, The Bobbs-Merril Co., Inc. p.113 (1978)

" ....trial court properly ordered joinder of trustee and noteholder.. Rules Civ. Proc., Rules 19, 21.." *Long v. City of Charlotte*, 293 S.E. 2d 101 at 103 [15] (N.C.1982).

If a party does not move to enjoin a necessary party, the court must do so *ex mero motu. N.C. Civil Procedure, supra,* at 378; *Brooker v. Everhart,* 240 S.E. 2d 360, 365,367 (N.C.1968)

The alleged defense of qualified immunity in *Langdon v. Swain et al.* was waived because it was not raised in the lower courts. *Harlow v. Fitzgerald,* 457 U.S. 800, 815, (1982). I'm not litigating it now by implied consent.

I solemnly affirm, under oath, that everything contained herein is true and correct, except those matters asserted on information and belief, and those matters I believe to be true and correct.

Christopher Langdon,
Petitioner

1835 Edwin Blvd.,Winter Park, Fl. 32789
407-647-7539

Suscribed to and sworn before me, this the 3rd day of ~~September~~ OCTOBER, 2002.

Notary Public

Permanand Bhikha
My Commission DD000669
Expires March 15, 2005